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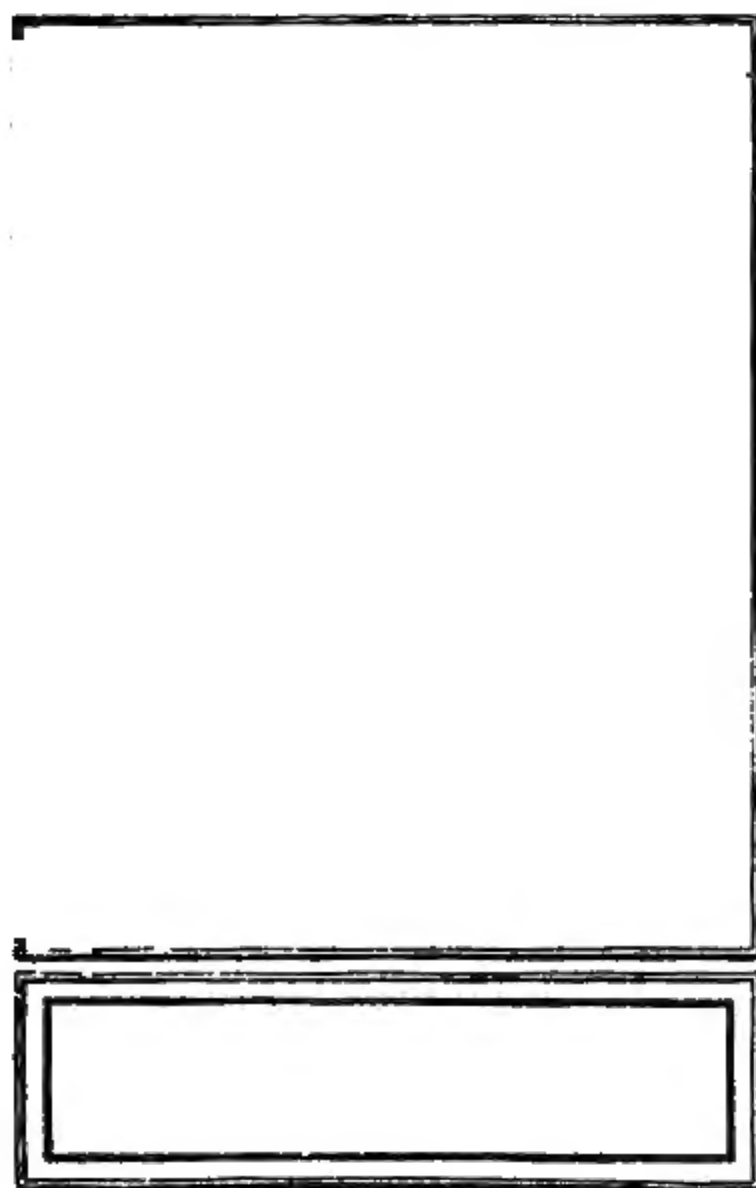
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INTERNATIONAL LAW.

A TREATISE

BY

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VOL. I.

PEACE

SECOND EDITION

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PREFACE

TO THE SECOND EDITION

THE course of events since 1905, when this work first made its appearance, and the results of further research have necessitated not only the thorough revision of the former text and the rewriting of some of its parts, but also the discussion of a number of new topics. But while the new matter which has been incorporated has added considerably to the length of the work—the additions to the bibliography, text, and notes amounting to nearly a quarter of the former work—this second edition is not less convenient in size than its predecessor. By rearranging the matter on the page, using a line extra on each, and a greater number of words on a line, by setting the bibliography and notes in smaller type, and by omitting the Appendix, it has been found possible to print the text of this new edition on 626 pages, as compared with 594 pages of the first edition.

The system being elastic it was possible to place most of the additional matter within the same sections and under the same headings as before. Some of the points treated are, however, so entirely new that it was necessary to deal with them under separate headings, and within separate sections. The reader will easily distinguish them, since, to avoid disturbing the arrangement of topics, these new sections have been inserted between the old ones, and numbered as the sections preceding them, but with the addition of the letters *a*, *b*, &c. The more important of these new sections are the following : § 178*a* (concerning the utilisation of

the flow of rivers) ; §§ 287*a* and 287*b* (concerning Wireless Telegraphy on the Open Sea) ; §§ 287*c* and 287*d* (concerning Mines and Tunnels in the Subsoil of the Sea bed) ; § 446*a* (concerning the Casa Blanca incident) ; §§ 476*a* and 476*b* (concerning the International Prize Court and the suggested International Court of Justice) ; §§ 568*a* and 568*b* (concerning the Conventions of the Second Hague Peace Conference, and the Declaration of London) ; § 576*a* (concerning Pseudo-Guarantees). Only towards the end of the volume has this mode of dealing with the new topics been departed from. As the chapter treating of Unions, the last of the volume, had to be entirely rearranged and rewritten, and a new chapter on Commercial Treaties inserted, the old arrangement comes to an end with § 577 ; and §§ 578 to 596 of this new edition present an arrangement of topics which differs from that of the former edition.

I venture to hope that this edition will be received as favourably as was its predecessor. My aim, as always, has been to put the matter as clearly as possible before the reader, and nowhere have I forgotten that I am writing as a teacher for students. It is a matter of great satisfaction to me that the prophetic warnings of some otherwise very sympathetic reviewers that a comprehensive treatise on International Law in two volumes would never be read by young students have proved mistaken. The numerous letters which I have received from students, not only in this country but also in America, Japan, France, and Italy, show that I was not wrong when, in the preface to the former edition, I described the work as an elementary book for those beginning to study the subject. Many years of teaching have confirmed me in the conviction that those who approach the study of International Law should at the outset be brought face to face with its complicated problems, and should at once acquire a

thorough understanding of the wide scope of the subject. If writers and lecturers who aim at this goal will but make efforts to use the clearest language and an elementary method of explanation, they will attain success in spite of the difficulty of the problems and the wide range of topics to be considered.

I owe thanks to many reviewers and readers who have drawn my attention to mistakes and misprints in the first edition, and I am especially indebted to Mr. C. J. B. Hurst, C.B., Assistant Legal Adviser to the Foreign Office, to Mr. E. S. Roscoe, Admiralty Registrar of the High Court, and to Messrs. F. Ritchie and G. E. P. Hertslet of the Foreign Office who gave me valuable information on certain points while I was preparing the manuscript for this edition. And I must likewise most gratefully mention Miss B. M. Rutter and Mr. C. F. Pond who have assisted me in reading the proofs and have prepared the table of cases and the exhaustive alphabetical index.

L. OPPENHEIM.

WERWELL HOUSE,

CAMBRIDGE,

November 1, 1911.

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows :—

A.J.	=	The American Journal of International Law.
Annuaire	=	Annuaire de l'Institut de Droit International.
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Bonfils	=	Bonfils, Manuel De Droit International Public, 5th ed. by Fauchille (1908).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit International etc., 5th ed. 6 vols. (1896).
Despagnet	=	Despagnet, Cours De Droit International Public, 4th ed. by de Boeck (1910).
Field	=	Field, Outlines of an International Code (1872).
Fiore	=	Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Fiore, Code	=	Fiore, Le Droit International Codifié, nouvelle édition, traduite de l'Italien par Antoine (1911).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1910).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).
Hall	=	Hall, A Treatise on International Law, 4th ed. (1895).
Halleck	=	Halleck, International Law, 3rd English ed. by Sir Sherston Baker, 2 vols. (1893).
Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).

Heffter	=	Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).
Heilborn, System	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Holland, Studies	=	Holland, Studies in International Law (1898).
Holland, Jurisprudence	=	Holland, The Elements of Jurisprudence, 6th ed. (1893).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885-1889).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Lawrence	=	Lawrence, The Principles of International Law, 4th ed. (1910).
Lawrence, Essays	=	Lawrence, Essays on some Disputed Questions of Modern International Law (1884).
Liszt	=	Liszt, Das Völkerrecht, 6th ed. (1910).
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883-1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis Du Droit Des Gens Moderne De L'Europe, nouvelle éd. par Vergé, 2 vols. (1858).
Martens, R. Martens, N.R. Martens, N.S. Martens, N.R.G. Martens, N.R.G. 2nd Ser. Martens, N.R.G. 3rd Ser.	<div style="display: flex; align-items: center;"> <div style="font-size: 4em; margin-right: 10px;">}</div> <div> <p>These are the abbreviated quotations of the different parts of Martens, Recueil De Traités (see p. 102 of this volume), which are in common use.</p> </div> </div>	
Martens, Causes Célèbres	=	Martens, Causes Célèbres Du Droit Des Gens, 5 vols., 2nd ed. (1858-1861).
Mérignhac	=	Mérignhac, Traité De Droit Public International, vol. i. (1905), vol. ii. (1907).
Moore	=	Moore, A Digest of International Law, 8 vols., Washington (1906).
Nys	=	Nys, Le Droit International, 3 vols. (1904-1906).
Perels	=	Perels, Das internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).

Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd ed. (1879–1888).
Piedelièvre	=	Piedelièvre, Précis De Droit International Public, 2 vols. (1894–1895).
Pradier-Fodéré	=	Pradier-Fodéré, Traité De Droit International Public, 8 vols. (1885–1906).
Pufendorf	=	Pufendorf, De Jure Naturæ et Gentium (1672).
Rivier	=	Rivier, Principes Du Droit Des Gens, 2 vols. (1896).
R.I.	=	Revue De Droit International Et De Législation Comparée.
R.G.	=	Revue Général De Droit International Public.
Taylor	=	Taylor, A Treatise on International Public Law (1901).
Testa	=	Testa, Le Droit Public International Maritime, traduction du Portugais par Boutiron (1886).
Twiss	=	Twiss, The Law of Nations, 2 vols., 2nd ed. (1884, 1875).
Ullmann	=	Ullmann, Völkerrecht, 2nd ed. (1908).
Vattel	=	Vattel, Le Droit Des Gens, 4 books in 2 vols., nouvelle éd. (Neuchâtel, 1773).
Walker	=	Walker, A Manual of Public International Law (1895).
Walker, History	=	Walker, A History of the Law of Nations, vol. i. (1899).
Walker, Science	=	Walker, The Science of International Law (1893).
Westlake	=	Westlake, International Law, 2 vols. (1904–1907).
Westlake, Chapters	=	Westlake, Chapters on the Principles of International Law (1894).
Wharton	=	Wharton, A Digest of the International Law of the United States, 3 vols. (1886).
Wheaton	=	Wheaton, Elements of International Law, 8th American ed. by Dana (1866).
Z.V.	=	Zeitschrift für Völkerrecht und Bundesstaatsrecht.

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INTRODUCTION

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CHAPTER I

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—Westlake, I. pp. 1-13—Walker, History, I. §§ 1-8—Halleck, I. pp.
46-55—Ullmann, §§ 2-4—Heffter, §§ 1-5—Holtzendorff in Holtzendorff,
I. pp. 19-26—Nys, I. pp. 133-43—Rivier, I. § 1—Bonfils, Nos. 26-31—
Pradier-Fodéré, I. Nos. 1-24—Mérignhac, I. pp. 5-28—Martens, I. §§ 1-5
—Fiore, I. Nos. 186-208, and Code, Nos. 1-26—Higgins, "The Bind-
ing Force of International Law" (1910)—Pollock in *The Law Quarterly*
Review, XVIII. (1902), pp. 418-428—Scott in A.J. I. (1907), pp. 831-865—
Willoughby and Root in A.J. II. (1908), pp. 357-365 and 451-457.

§ 1. Law of Nations or International Law (*Droit des gens*, *Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally¹ binding by civilised States in their intercourse with each other. Such part of these rules as is binding upon all the civilised States without exception is called universal International Law,² in contradistinction to particular International Law, which is binding on two or a few States only. But it is also necessary to distinguish General International Law. This name must be given to the body of such rules as are binding upon a great many States, including leading Powers. General International Law, as, for instance, the Declaration of Paris 1856, has a tendency to become universal International Law.

Concep-
tion of the
Law of
Nations.

¹ contradistinction to mere
and to rules of so-called Inter-
national Comity, see below §§ 9 and 19.

² The best example of universal
International Law is the law con-
nected with legation.

4. FOUNDATION OF THE LAW OF NATIONS

International Law in the meaning of the term as used in modern times did not exist during antiquity and the first part of the Middle Ages. It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules to the Dutch jurist and statesman Hugo Grotius, whose work, "De Jure Belli ac Pacis libri III.," appeared in 1625 and became the foundation of all later development.

The Law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law between, not above, the several States, and is, therefore, since Bentham, also called "International Law."

Since the distinction of Bentham between International Law public and private has been generally accepted, it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not. The latter concerns such matters as fall at the same time under the jurisdiction of two or more different States. And as the Municipal Laws of different States frequently in conflict with each other respecting such matters, jurists belonging to different countries endeavour to find a body of principles according to which such conflicts can be avoided.

§ 2. Almost from the beginning of the science of Law of Nations the question has been discussed whether the rules of International Law are *legally* binding. Hobbes¹ already and Pufendorf² had answered the question in the negative. And during the nineteenth

¹ De Cive, XIV. 4.

² De Jure Naturæ et Gentium, II. c. iii. § 22.

century Austin¹ and his followers take up the same attitude. They define law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. For International Law is a body of rules governing the relations of Sovereign States between one another. And there is not and cannot be a sovereign political authority above the Sovereign States which could enforce such rules. However, this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is termed unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through the indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the written law, and that the State does not prevent them from doing so. This is, however, nothing else than a fiction. Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

¹ Lectures on Jurisprudence, VI.

Character-
istics of
Rules of
Law.

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct. Now the characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality, if it was not done out of free will and conscientiousness, but ~~was enforced~~ by some external power or was done out of some consideration which lies without the boundaries of conscience. Thus, a man who gives money to the hospitals in order that his name shall come before the public does not act morally, and his deed is not a moral one, though it appears to be one outwardly. On the other hand, the characteristic of rules of law is that they shall eventually be enforced by external power.¹ Rules of law apply, of course, to conscience quite as much as rules of morality. But the latter require to be enforced by the internal power of conscience only, whereas the former require to be enforced by some external power. When, to give an illustrative example, morality commands you to pay your debts, it hopes that your conscience will make you pay them. On the other hand, if the law gives the same command, it hopes that, if the conscience has not sufficient power to make you pay your debts, the fact that, if you will not pay, the bailiff will come into your house, will do so.

Law-
giving
Authority
not essen-
tial for
the
Existence
of Law.

§ 4. If these are the characteristic signs of morality and of law, we are justified in stating the principle: A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it shall eventually be enforced by external power. With-

¹ Westlake, Chapters, p. 12, seems to make the same distinction between rules of law and of morality,

and Twiss, I. § 105, adopts it *expressis verbis*.

out some kind both of morality and law, no community has ever existed or could possibly exist. But there need not be, at least not among primitive communities, a law-giving authority within a community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others shall by common consent of the community be enforced ; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it. Of course, when a community is growing out of the primitive condition of its existence and becomes gradually so enlarged that it turns into a State in the sense proper of the term, the necessities of life and altered circumstances of existence do not allow the community itself any longer to do anything and everything. And the law can now no longer be left entirely in the hands of the different factors which make it grow gradually from case to case. A law-giving authority is now just as much wanted as a governing authority. It is for this reason, that we find in every State a Legislature, which makes laws, and courts of justice, which administer them.

However, if we ask whence does the power of the Legislature to make laws come, there is no other answer than this : From the common consent of the community. Thus, in Great Britain, Parliament is the law-making body by common consent. An Act of Parliament is law, because the common consent of

Great Britain is behind it. That Parliament has law-making authority is law itself, but unwritten and customary law. *Thus the very important fact comes to light that all statute or written law is based on unwritten law in so far as the power of Parliament to make Statute Law is given to Parliament by unwritten law.* It is the common consent of the British people that Parliament shall have the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary, which are day by day recognised through courts of justice.

Definition
and three
Essential
Condi-
tions of
Law.

§ 5. On the basis of the results of these previous investigations we are now able to give a definition of law. We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.*

The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that such rules of conduct must be written rules, or that there should be a law-making authority or a law-administering court within the community concerned. And it is evident that, if we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community. The best example of the existence of law outside the State is the law of the Roman Catholic Church, the so-called Canon Law. This Church is an organised community whose members are dispersed over the whole surface of the earth. They consider themselves bound

by the rules of the Canon Law, although there is no sovereign political authority that sets and enforces those rules, the Pope and the bishops and priests being a religious authority only. But there is an external power through which the rules of the Canon Law are enforced—namely, the punishments of the Canon Law, such as excommunication, refusal of sacraments, and the like. And the rules of the Canon Law are in this way enforced by common consent of the whole Roman Catholic community.

§ 6. But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be identified with the law of States, the so-called Municipal Law,¹ just as the conception of State must not be identified with the conception of community. The conception of community is a wider one than the conception of State. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law, as, for instance, the Canon Law is not. Municipal Law is a narrower conception than law pure and simple. The body of rules which is called the Law of Nations might, therefore, be law in the strict sense of the term, although it might not possess the characteristics of Municipal Law. To make sure whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

Law not to be identified with Municipal Law.

§ 7. As the first condition is the existence of a community, the question arises, whether an international community exists whose law could be the Law of Nations. Before this question can be answered, the

The "Family of Nations" as a Community.

¹ Throughout this work the term "Municipal Law" is made use of in contradistinction to International Law.
in the sense of national or State law

conception of community must be defined. A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of community covers not only a community of individual men, but also a community of individual communities such as individual States. A Confederation of States is a community of States. But is there a universal international community of all individual States in existence? This question is decidedly to be answered in the affirmative as far as the States of the civilised world are concerned. Innumerable are the interests which knit all the individual civilised States together and which create constant intercourse between these States as well as between their subjects. As the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them. There are, further, science and art, which are by their nature to a great extent international, and which create a constant exchange of ideas and opinions between the subjects of the several States. Of the greatest importance are, however, agriculture, industry, and trade. It is totally impossible even for the largest empire to produce everything its subjects want. Therefore, the productions of agriculture and industry must be exchanged by the several States, and it is for this reason that international trade is an unequalled factor for the welfare of every civilised State. Even in antiquity, when every State tried to be a world in itself, States did not and could not exist without some sort of international trade. It is international trade which has created navigation on the high seas and on the rivers flowing through different States. It is, again, international trade which has called into existence the nets of

railways which cover the continents, the international postal and telegraphic arrangements, and the Transatlantic telegraphic cables.¹

The manifold interests which knit all the civilised States together and create a constant intercourse between one another, have long since brought about the necessity that these States should have one or more official representatives living abroad. Thus we find everywhere foreign envoys and consuls. They are the agents who make possible the current stream of transactions between the Governments of the different States. A number of International Offices, International Bureaux, International Commissions have been permanently appointed for the administration of international business, a permanent Court of Arbitration has been, and an International Prize Court will soon be, established at the Hague. And from time to time special international conferences and congresses of delegates of the different States are convoked for discussing and settling matters international. Though the individual States are sovereign and independent of each other, though there is no international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community. For many hundreds of years this community has been called "Family of Nations" or "Society of Nations."

§ 8. Thus the first essential condition for the existence of law is a reality. The single States make altogether a body of States, a community of individual

The
"Family
of Na-
tions" a
Commu-

¹ See Fried, "Das internationale Leben der Gegenwart" (1908), where the innumerable interests are grouped

and discussed which knit the civilised world together.

nity with
Rules of
Conduct.

States. But the second condition cannot be denied either. For hundreds of years more and more rules have grown up for the conduct of the States between each other. These rules are to a great extent customary rules. But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements, such as the Declaration of Paris of 1856, the Hague Rules concerning land warfare of 1899 and 1907, and the like. The so-called Law of Nations is nothing else than a body of customary and conventional rules regulating the conduct of the individual States with each other. Just as out of tribal communities which were in no way connected with each other arose the State, so the Family of Nations arose out of the different States which were in no way connected with each other. But whereas the State is a settled institution, firmly established and completely organised, the Family of Nations is still in the beginning of its development. A settled institution and firmly established it certainly is, but it entirely lacks at present any organisation whatever. Such an organisation is, however, gradually growing into existence before our eyes. The permanent Court of Arbitration created by the First Hague Peace Conference, and the International Prize Court proposed by the Second Hague Peace Conference, are the first small traces of a future organisation. The next step forward will be that the Hague Peace Conferences will meet automatically within certain periods of time, without being summoned by one of the Powers. A second step forward will be the agreement on the part of the Powers upon fixed rules of procedure for the future Hague Peace Conferences. As soon as these two steps forward are really made, the nucleus of an organisation of the Family of Nations will be in existence, and out of this nucleus will grow in time a more powerful organisation,

the ultimate characteristic features of which cannot at present be foreseen.¹

§ 9. But how do matters stand concerning the third essential condition for the existence of law? Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered, although there is no central authority to enforce those rules. The heads of the civilised States, their Governments, their Parliaments, and public opinion of the whole of civilised humanity, agree and consent that the body of rules of international conduct which is called the Law of Nations shall be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. And in the necessary absence of a central authority for the enforcement of the rules of the Law of Nations, the States have to take the law into their own hands. Self-help and intervention on the part of other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be² and actually are enforced. It is true that these means have many disadvantages, but they are means which have the character of external power. Compared with Municipal Law and the means at disposal for its enforcement, the Law of Nations is certainly the weaker of the two. A law is the stronger, the more guarantees are given that it can and will be enforced. Thus, the law of a State which is governed by an uncorrupt Government and the courts of which are not venal is stronger than the law of a State which has a corrupt Government and venal judges. It is inevitable that the Law of Nations must be a weaker

External
Power for
the En-
forcement
of Rules of
International
Conduct.

¹ See Oppenheim, "Die Zukunft des Völkerrechts" (1911), *passim*.

² See below, § 135, concerning intervention by right.

law than Municipal Law, as there is not and cannot be an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be.¹

Practice
recognises
Law of
Nations as
Law.

§ 10. The fact is that theorists only are divided concerning the character of the Law of Nations as real law. In practice International Law is constantly recognised as law. The Governments and Parliaments of the different States are of opinion that they are legally, not morally only, bound by the Law of Nations, although they cannot be forced to go before a court in case they are accused of having violated it. Likewise, public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the several States not only recognise the rules of International Law as legally binding in innumerable treaties, but emphasise every day the fact that there is a law between themselves. They moreover recognise this law by their Municipal Laws ordering their officials, their civil and criminal courts, and their subjects to take up such an attitude as is in conformity with the duties imposed upon their Sovereign by the Law of Nations. If a violation of the Law of Nations occurs on the part of an individual State, public opinion of the civilised world, as well as the Governments of other States, stigmatise such violation as a violation of law pure and

¹ Those who deny to International Law the character of law because they identify the conception of law in general with that of Municipal Law and because they cannot see any law outside the State, confound

cause and effect. Originally law was not a product of the State, but the State was a product of law. The right of the State to make law is based upon the rule of law that the State is competent to make law.

simple. And countless treaties concerning trade, navigation, post, telegraph, copyright, extradition, and many other objects exist between civilised States, which treaties, resting entirely on the existence of a law between the States, presuppose such a law, and contribute by their very existence to its development and growth.

Violations of this law are certainly frequent. But the offenders always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. Has a State ever confessed that it was going to break the Law of Nations or that it ever did so? The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations in a way favourable to their act. And there is an ever-growing tendency to bring disputed questions of International Law as well as international differences in general before international courts. The permanent Court of Arbitration at the Hague established in 1899, and the International Prize Court proposed at the Hague according to a convention of 1907, are the first promising fruits of this tendency.

II

BASIS OF THE LAW OF NATIONS

§ 11. If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, common consent is the basis of all law. What, now, does the term "common consent" mean? If it meant that all the individuals who

Common
Consent
the Basis
of Law.

are members of a community must at every moment of their existence expressly consent to every point of law, such common consent would never be a fact. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others. The community remains unaltered, although a constant change takes place in its members. "Common consent" can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever, and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to the wills of its single members. The question as to whether there be such a common consent in a special case, is not a question of theory, but of fact only. It is a matter of observation and appreciation, and not of logical and mathematical decision, just as is the well-known question, how many grains make a heap? Those legal rules which come down from ancestors to their descendants remain law so long only as they are supported by common consent of these descendants. New rules can only become law if they find common consent on the part of those who constitute the community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten.

Common
Consent
of the
Family of
Nations
the Basis
of Inter-
national
Law.

§ 12. What has been stated with regard to law pure and simple applies also to the Law of Nations. However, the community for which this Law of Nations is authoritative consists not of individual human beings, but of individual States. And whereas in communities consisting of individual human beings there is a constant and gradual change of the members through birth, death, emigration, and immigration, the Family of

Nations is a community within which no such constant change takes place, although now and then a member disappears and a new member steps in. The members of the Family of Nations are therefore not born into that community and they do not grow into it. New members are simply received into it through express or tacit recognition. It is therefore necessary to scrutinise more closely the common consent of the States which is the basis of the Law of Nations.

The customary rules of this law have grown up by common consent of the States—that is, the different States have acted in such a manner as includes their tacit consent to these rules. As far as the process of the growth of a usage and its turning into a custom can be traced back, customary rules of the Law of Nations came into existence in the following way. The intercourse of States with each other necessitated some rules of international conduct. Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when an occasion arose. As some rules of international conduct were from the end of the Middle Ages urgently wanted, the theory of the Law of Nations prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections. Hugo Grotius's work, "De Jure Belli ac Pacis libri III." (1625), offered a systematised body of rules, which recommended themselves so much to the needs and wants of the time that they became the basis of the development following. Without the conviction of the Governments and of public opinion of the civilised States that there ought to be legally binding rules for international conduct, on the one hand, and, on the other hand, without the pressure exercised upon the States by their interests and the necessity for the growth of such rules, the latter would never have

grown up. When afterwards, especially in the nineteenth century, it became apparent that customs and usages alone were not sufficient or not sufficiently clear, new rules were created through law-making treaties being concluded which laid down rules for future international conduct. Thus conventional rules gradually grew up side by side with customary rules.

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the Family of Nations consented to it. No single State can say on its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exception of those which, such as the rules of the Geneva Convention for instance, are specially stipulated for such States only as have concluded, or later on acceded to, a certain international treaty creating the rules concerned.

On the other hand, no State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory powers to give notice of withdrawal. It would, for

instance, be a violation of International Law on the part of a signatory Power of the Declaration of Paris of 1856 to declare that it would cease to be a party. But it must be emphasised that this does not apply to such conventional rules as are stipulated by a law-making treaty which expressly reserves the right to the signatory Powers to give notice.

§ 13 Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. (This means that the Law of Nations is a law for the international conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as a king or an ambassador for example, is never directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the respective State by International Law. Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are not international duties, but duties imposed by Municipal Law in accordance with a right granted to or a duty imposed upon the respective State by International Law. Thus the privileges of an ambassador are granted to him by the Municipal Law of the State to which he is accredited, but such State has the duty to grant these privileges according to International Law. Thus, further, the duties incumbent upon officials and subjects of neutral States in time of war are imposed upon them by the Municipal Law of their home States, but these States have, according to International Law, the duty of

States the
Subjects
of the
Law of
Nations.

imposing the respective duties upon their officials and citizens.¹

Equality
an Inference from
the Basis
of International
Law.

§ 14. Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.²

III

SOURCES OF THE LAW OF NATIONS

Hall, pp. 5-14—Maine, pp. 1-25—Lawrence, §§ 61-66—Phillimore, I. §§ 17-33—Twiss, I. §§ 82-103—Taylor, §§ 30-36—Westlake, I. pp. 14-19—Wheaton, § 15—Halleck, I. pp. 55-64—Ullmann, §§ 8-9—Heffter, § 3—Holtzendorff in Holtzendorff, I. pp. 79-158—Rivier, I. § 2—Nys, I. pp. 144-165—Bonfilis, Nos. 45-63—Despagnet, Nos. 58-63—Pradier-Fodéré, I. Nos. 24-35—Mérignhac, I. pp. 79-113—Martens, I. § 43—Fiore, I. Nos. 224-238—Calvo, I. §§ 27-38—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877)—Jellinek, "Die rechtliche Natur der Staatsverträge" (1880)—Cavaglieri, "La consuetudine giuridica internazionale" (1907).

Source in
Contradiction to
Cause.

§ 15. The different writers on the Law of Nations disagree widely with regard to kinds and numbers of sources of this law. The fact is that the term "source of law" is made use of in different meanings by the

¹ The importance of the fact that subjects of the Law of Nations are States exclusively is so great that I consider it necessary to emphasise it again and again throughout this work. See, for instance, below, §§ 289, 344, 384. It should, however, already be mentioned here that this assertion is even nowadays still sometimes contradicted; see, for instance, Kaufmann, "Die Rechtskraft

des Internationalen Rechts" (1899) *passim*; Rehm in Z.V.I. (1907), p. 53, and Diena in R.G. XVI. pp. 57-76.

² See below, §§ 115-116, where the legal equality of States in contradiction to their political inequality is discussed, and where it will also be shown that not-full Sovereign States are not equals of full-Sovereign States.

different writers on International Law, as on law in general. It seems to me that most writers confound the conception of "source" with that of "cause," and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of Nations. This mistake can be avoided by going back to the meaning of the term "source" in general. Source means a spring or well, and has to be defined as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a certain spot of the ground, whatever natural causes there may be for that rising. If we apply the conception of source in this meaning to the term "source of law," the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules rise into existence, there is the source of them. Of course, rules of law do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in Great Britain a good many rules of law rise every year from Acts of Parliament. "Source of Law" is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.

§ 16. As the basis of the Law of Nations is the

The two
Sources of

Inter-
national
Law.

common consent of the member States of the Family of Nations, it is evident that there must exist, and can only exist, as many sources of International Law as there are facts through which such common consent can possibly come into existence. Of such facts there are only two. A State, just as an individual, may give its consent either directly by an express declaration or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold—namely: (1) express consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations.

Custom in
Contra-
distinc-
tion to
Usage.

§ 17. Custom is the older and the original source of International Law in particular as well as of law in general. Custom must not be confounded with usage. In everyday life and language both terms are used synonymously, but in the language of the jurist they have two distinctly different meanings. Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are legally necessary or legally right. On the other hand, jurists speak of a usage, when a habit of doing certain actions has grown up without there being the conviction of their legal character. Thus the term “custom” is in juristic language a narrower conception than the term “usage,” as a given course of conduct may be usual without being customary. Certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary International Law.

As usages have a tendency to become custom, the

question presents itself, at what time a usage turns into a custom. This question is one of fact, not of theory. All that theory can point out is this: Wherever and as soon as a frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.

§ 18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,¹ it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called law-making treaties. Since the Family of Nations is not a State-like community, there is no central authority which could make law for it in a similar way as Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is that the members of the Family of Nations conclude treaties in which certain rules for their future conduct are stipulated. Of course, such law-making treaties create law for the contracting parties solely. Their law is *universal* International Law then only, when all the members of the Family of Nations are parties to them. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law. On the other hand, there have been many law-making treaties concluded which contain *general* International Law, because the majority of States, including leading Powers, are parties to them. General International Law has a tendency to become universal because such States as hitherto did

Treaties
as Source
of Inter-
national
Law.

¹ See below, § 492.

not consent to it will in future either expressly give their consent or recognise the respective rules tacitly through custom.¹ But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties.²

Factors
influencing the
Growth of
International
Law.

§ 19. Thus custom and treaties are the two exclusive sources of the Law of Nations. When writers on International Law frequently enumerate other sources besides custom and treaties, they confound the term "source" with that of "cause" by calling sources of International Law such factors as influence the gradual growth of new rules of International Law without, however, being the historical facts from which these rules receive their legal force. Important factors of this kind are: Opinions of famous writers³ on International Law, decisions of prize courts, arbitral awards,⁴ instructions issued by the different States for the guidance of their diplomatic and other organs, State Papers concerning foreign politics, certain Municipal Laws, decisions of Municipal Courts.⁵ All these and other factors may influence the growth of International Law either by creating usages which gradually turn into custom, or by inducing the members of the Family of Nations to conclude such treaties as stipulate legal rules for future international conduct.

A factor of a special kind which also influences the growth of International Law is the so-called *Comity* (*Comitas Gentium, Convenance et Courtoisie Internationale*,

¹ Law-making treaties of world-wide importance are enumerated below, §§ 556-568b.

² See below, § 493.

³ See Oppenheim in A.J. II. (1908), pp. 344-348.

⁴ See Oppenheim in A.J. II. (1908), pp. 341-344.

⁵ See Oppenheim in A.J. II. (1908), pp. 336-341.

Staatengunst). In their intercourse with one another, States do observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is distinctly the contrast to the Law of Nations. But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a rule of present International Comity will in future become one of International Law.¹

Not to be confounded with the rules of Comity are the rules of morality which ought to apply to the intercourse of States as much as to the intercourse of individuals.

IV

RELATIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW

Holtzendorff in Holtzendorff, I. pp. 49-53, 117-120—Nys, I. pp. 185-189—Taylor, § 103—Holland, Studies, pp. 176-200—Kaufmann, "Die Rechtskraft des internationalen Rechts" (1899)—Triepel, "Völkerrecht und Landesrecht" (1899)—Anzilotti, "Il diritto internazionale nei giudizi interni" (1905)—Kohler in Z.V. II. (1908), pp. 209-230.

§ 20. The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family

Essential
Difference
between
Inter-
national
and Muni-
cipal Law.

¹ The matter is ably discussed in Stoerk, "Völkerrecht und Völkercourtoisie" (1908).

of Nations and law-making treaties concluded by the members of that family.

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations.

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a Sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between Sovereign States, and therefore a weaker law.¹

Law of Nations never *per se* Municipal Law.

§ 21. If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption² become at the same time rules of Municipal Law. Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International

¹ See above, § 9.

² This has been done by the United States. See *The Nereide*, 9 Cranch, 388; *United States v. Smith*, 5 Wheaton, 153; *The Scotia*, 14 Wallace, 170; *The Paquette Habana*, 175 United States, 677. See also Taylor, § 103, and Scott in A.J.I.

(1908), pp. 852-865. As regards Great Britain, see Blackstone, IV. ch. 5, and Westlake in *The Law Quarterly Review*, XXII. (1906), pp. 14-26; see also the case of the *West Rand Central Mining Co. v. The King* (1905), 2 K. B. 391.

Law, because it has, *per se*, no power over municipal courts.¹ And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of the Law of Nations, municipal courts must apply the former. If, on the other hand, a rule of the Law of Nations regulates a fact without conflicting with, but without expressly or tacitly having been adopted by Municipal Law, municipal courts cannot apply such rule of the Law of Nations.

§ 22. If Municipal Courts cannot apply unadopted rules of the Law of Nations, and must apply even such rules of Municipal Law as conflict with the Law of Nations, it is evident that the several States, in order to fulfil their international obligations, are compelled to possess certain rules, and are prevented from having certain other rules as part of their Municipal Law. It is not necessary to enumerate all the rules of Municipal Law which a State must possess, and all those rules it is prevented from having. It suffices to give some illustrative examples. Thus, on the one hand, the Municipal Law of every State, for instance, is compelled to possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, threatening punishment for certain acts committed on its territory in violation of a foreign State. On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents with regard to injuries committed

Certain Rules of Municipal Law necessitated or interdicted.

¹ This ought to be generally recognised, but, in fact, is not; says, for instance, Kohler in Z. V. II. (1908), p. 210: —“ . . . das Völkerrecht ist ein überstaatliches Recht, das der Gesetzgebung

des einzelnen Staates nicht unterworfen ist und von den Richtern ohne weiteres respectirt werden muss: das Völkerrecht steht über dem staatlichen Recht.”

on its territory to their lives, liberty, and property by its own citizens. If a State does nevertheless possess such rules of Municipal Law as it is prevented from having by the Law of Nations, or if it does not possess such Municipal rules as it is compelled to have by the Law of Nations, it violates an international legal duty, but its courts¹ cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations.

Presump-
tion
against
conflicts
between
Inter-
national
and Muni-
cipal Law.

§ 23. However, although Municipal Courts must apply Municipal Law even if conflicting with the Law of Nations, there is a presumption against the existence of such a conflict. As the Law of Nations is based upon the common consent of the different States, it is improbable that a civilised State would intentionally enact a rule conflicting with the Law of Nations. A part of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as essentially not containing such conflict.

Presump-
tion of
Existence
of certain
necessary
Municipal
Rules.

§ 24. In case of a gap in the statutes of a civilised State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the Courts to have been tacitly adopted by such Municipal Law. It may be taken for granted that a State which is a member of the Family of Nations does not intentionally want its Municipal Law to be deficient in such rules. If, for instance, the Municipal Law of a State does not by a statute grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted.

Presump-
tion of the
Existence
of certain
Municipal

§ 25. There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws ex-

¹ This became quite apparent in the Moray Firth case (*Mortensen v. Peters*)—see below, § 192—in which

the Court had to apply British Municipal Law.

pressly renounce the whole or partial use of such rights, provided always it is ready to fulfil such duties, if any, as are connected with these rights. However, when no such renunciation has taken place, Municipal Courts ought, in case the interests of justice demand it, to presume that their Sovereign has tacitly consented to make use of such rights. If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their Sovereign has tacitly consented to that wider range of its jurisdiction.

Rules in
Con-
formity
with
Rights
granted
by the
Law of
Nations.

A remarkable case illustrating this happened in this country in 1876. The German vessel *Franconia*, while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel *Strathclyde*, and sank her. As a passenger on board the latter was thereby drowned, the commander of the *Franconia*, the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter. The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed in the English maritime belt. Keyn was therefore not punished.¹ To provide for future cases of like kind, Parliament passed, in 1878, the "Territorial Waters Jurisdiction Act."²

¹ L.R. 2 Ex. Div. 63. See Phillimore, I. § 198 B; Maine, pp. 39-45. See also below, § 189, where the controversy is discussed whether a

littoral State has jurisdiction over foreign vessels that merely pass through its maritime belt.

² 41 and 42 Vict. c. 73.

V

DOMINION OF THE LAW OF NATIONS

Lawrence, § 44—Phillimore, I. §§ 27-33—Twiss, I. § 62—Taylor, §§ 61-64—Westlake, I. p. 40—Bluntschli, §§ 1-16—Heffter, § 7—Holtzendorff in Holtzendorff, I. pp. 13-18—Nys, I. pp. 116-132—Rivier, I. § 1—Bonfils, Nos. 40-45—Despagnet, Nos. 51-53—Martens, I. § 41—Fiore, Code, Nos. 38-43—Ullmann, § 10—Nippold in Z. V. II. (1908), pp. 441-443—Cavaglieri in R.G. XVIII. (1911), pp. 259-292.

Range of
Dominion
of Inter-
national
Law con-
troversial.

§ 26. Dominion of the Law of Nations is the name given to the area within which International Law is applicable—that is, those States between which International Law finds validity. The range of the dominion of the Law of Nations is controversial, two extreme opinions concerning this dominion being opposed. Some publicists¹ maintain that the dominion of the Law of Nations extends as far as humanity itself, that every State, whether Christian or non-Christian, civilised or uncivilised, is a subject of International Law. On the other hand, several jurists² teach that the dominion of the Law of Nations extends only as far as Christian civilisation, and that Christian States only are subjects of International Law. Neither of these opinions would seem to be in conformity with the facts of the present international life and the basis of the Law of Nations. There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups

¹ See, for instance, Bluntschli, § 8, and Fiore, Code, No. 38.

² See, for instance, Martens, § 41.

of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States,

§ 27. Thus the membership of the Family of Nations has of late necessarily been increased, and the range of the dominion of the Law of Nations has extended beyond its original limits. This extension has taken place in conformity with the basis of the Law of Nations. As this basis is the common consent of the civilised States, there are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.

Three
Condi-
tions of
Member-
ship of the
Family of
Nations.

The last two conditions are so obvious that they need no comment. Regarding the first condition, however, it must be emphasised that not particularly Christian civilisation, but civilisation of such kind only is conditioned as to enable the State concerned and its subjects to understand and to act in conformity with the principles of the Law of Nations. These principles cannot be applied to a State which is not able to apply them on its own part to other States. On the other hand, they can well be applied to a State which is able and willing to apply them to other States, provided a constant intercourse has grown up between it and other States. The fact is that the Christian States have been of late compelled by pressing circumstances to receive

several non-Christian States into the community of States which are subjects of International Law.

Present
range of
Dominion
of the
Law of
Nations.

§ 28. The present range of the dominion of International Law is a product of historical development within which epochs are distinguishable marked by successive entrances of various States into the Family of Nations.

(1) The old Christian States of Western Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties. Whenever afterwards a new Christian State made its appearance in Europe, it was received into the charmed circle by the old members of the Family of Nations. It is for this reason that this law was in former times frequently called "European Law of Nations." But this name has nowadays historical value only, as it has been changed into "Law of Nations," or "International Law" pure and simple.

(2) The next group of States which entered into the Family of Nations is the body of Christian States which grew up outside Europe. All the American¹ States which arose out of colonies of European States belong to this group. And it must be emphasised that the United States of America have largely contributed to the growth of the rules of International Law. The two Christian Negro Republics of Liberia in West Africa and of Haiti on the island of San Domingo belong to this group.

(3) With the reception of the Turkish Empire into the Family of Nations International Law ceased to be a law between Christian States solely. This reception has expressly taken place through Article 7 of the Peace Treaty of Paris of 1856, in which the five Great

¹ But it ought not to be maintained that there is—in contradistinction to the European—an American International Law in existence; see,

however, Alvarez, "Le Droit International Américain" (1910), and again Alvarez in A.J. III. (1909), pp. 269-353.

European Powers of the time, namely, France, Austria, England, Prussia, and Russia, and besides those Sardinia, the nucleus of the future Great Power Italy, expressly "déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens." Since that time Turkey has on the whole endeavoured in time of peace and war to act in conformity with the rules of International Law, and she has, on the other hand, been treated¹ accordingly by the Christian States. No general congress has taken place since 1856 to which Turkey has not been invited to send her delegates.

(4) Another non-Christian member of the Family of Nations is Japan. A generation ago one might have doubted whether Japan was a real and full member of that family, but since the end of the nineteenth century no doubt is any longer justified. Through marvellous efforts, Japan has become not only a modern State, but an influential Power. Since her war with China in 1895, she must be considered one of the Great Powers that lead the Family of Nations.

(5) The position of such States as Persia, Siam, China, Morocco, Abyssinia, and the like, is doubtful. These States are certainly civilised States, and Abyssinia is even a Christian State. However, their civilisation has not yet reached that condition which is necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law. On the other hand, international intercourse has widely arisen between these States and the States of the so-called

¹ There is no doubt that Turkey, in spite of having been received into the Family of Nations, has nevertheless hitherto been in an anomalous position as a member of that family, owing to the fact that her civilisation has not yet reached the level of that

of the Western States. It is for this reason that the so-called Capitulations are still in force and that other anomalies still prevail, but their disappearance is only a question of time.

Western civilisation. Many treaties have been concluded with them, and there is full diplomatic intercourse between them and the Western States. China, Persia, and Siam have even taken part in the Hague Peace Conferences. All of them make efforts to educate their populations, to introduce modern institutions, and thereby to raise their civilisation to the level of that of the Western. They will certainly succeed in this respect in the near future. But as yet they have not accomplished this task, and consequently they are not yet able to be received into the Family of Nations as full members. Although they are, as will be shown below (§ 103), for some parts within the circle of the Family of Nations, they remain for other parts outside. But the example of Japan can show them that it depends entirely upon their own efforts to be received as full members into that family.

(6) It must be mentioned that a State of quite a unique character, the former Congo Free State,¹ was, since the Berlin Conference of 1884–1885, a member of the Family of Nations. But it lost its membership in 1908 when it merged in Belgium by cession.

Treat-
ment of
States
outside
the
Family of
Nations.

§ 29. The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain out-

¹ See below, § 101.

side that family. But the United States of America apply, as far as possible, the rules of International Law to their relations with the Red Indians.

VI

CODIFICATION OF THE LAW OF NATIONS

Holtzendorff in Holtzendorff, I. pp. 136-152—Ullmann, § 11—Despagnet, Nos. 67-68—Bonfils, Nos. 1713-1727—Mérignhac, I. pp. 26-28—Nys, I. pp. 166-183—Rivier, I. § 2—Fiore, I. Nos. 124-127—Martens, I. § 44—Holland, Studies, pp. 78-95—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877), pp. 44-77—Bulmerincq, "Praxis, Theorie, und Codification des Völkerrechts" (1874), pp. 167-192—Roszkowski in R.I. XXI. (1889), p. 520—Proceedings of the American Society of International Law, IV. (1910), pp. 208-227.

§ 30. The lack of precision which is natural to a large number of the rules of the Law of Nations on account of its slow and gradual growth has created a movement for its codification. The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification: He did not, however, propose codification of the existing positive Law of Nations, but thought of a utopian International Law which could be the basis of an everlasting peace between the civilised States.¹

Movement
in Favour
of Codifi-
cation.

Another utopian project is due to the French Convention, which resolved in 1792 to create a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795, Abbé Grégoire produced a draft of twenty-one articles, which, however,

¹ See Bentham's Works, ed. Bowring, VIII. p. 537; Nys, in *The Law Quarterly Review*, XI. (1885), pp. 226-231.

was rejected by the Convention, and the matter dropped.¹

It was not until 1861 that a real attempt was made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruchévecz, who published in that year at Leipzig a "Précis d'un Code de Droit International."

In 1862, the Russian Professor Katschenowsky brought an essay before the Juridical Society of London (Papers II. 1863) arguing the necessity of a codification of International Law.

In 1863, Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army.²

In 1868, Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published "Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt." This draft code has been translated into the French, Greek, Spanish, and Russian languages, and the Chinese Government produced an official Chinese translation as a guide for Chinese officials.

In 1872, the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay "Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti."

Likewise in 1872 appeared at New York David Dudley Field's "Draft Outlines of an International Code."

In 1873 the Institute of International Law was founded at Ghent in Belgium. This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of

¹ See Rivier, I. p. 40, where the full text of these twenty-one articles is given. They did not contain a

real code, but certain principles only.

² See below, vol. II. § 68.

International Law, and in especial a Draft Code of the Law of War on Land (1880).

Likewise in 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now the International Law Association.

In 1874 the Emperor Alexander II. of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomatists, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of The Declaration of Brussels. But the Powers have never ratified these articles.

In 1880 the Institute of International Law published its "Manuel des Lois de la Guerre sur Terre."

In 1887 Leone Levi published his "International Law with Materials for a Code of International Law."

In 1890 the Italian jurist Fiore published his "Il diritto internazionale codificato e sua sanzione giuridica," of which a fourth edition appeared in 1911.

In 1906 E. Duplessix published his "La loi des Nations. Projet d'institution d'une autorité nationale, législative, administrative, judiciaire. Projet de Code de Droit international public."

In 1911 Jerome Internoscia published his "New Code of International Law" in English, French, and Italian.

§ 31. At the end of the nineteenth century, in 1899, the so-called Peace Conference at the Hague, convened on the personal initiative of the Emperor Nicholas II. of Russia, has shown the possibility that parts of the Law of Nations may well be codified. Apart from three Declarations of minor value and of the convention concerning the adaptation of the Geneva Convention to naval warfare, this conference has succeeded in

Work of
the first
Hague
Peace
Confer-
ence.

producing two important conventions which may well be called codes—namely, first, the “Convention for the Pacific Settlement of International Disputes,” and, secondly, the “Convention with respect to the Laws and Customs of War on Land.” The great practical importance of the first-named convention is now being realised, as the Permanent Court of Arbitration has in a number of cases already successfully given its award. Nor can the great practical value of the second-named convention be denied. Although the latter contains, even in the amended form given to it by the second Hague Peace Conference of 1907, many gaps, which must be filled up by the customary Law of Nations, and although it is not a masterpiece of codification, it represents a model, the very existence of which teaches that codification of parts of the Law of Nations is practicable, provided the Powers are inclined to come to an understanding. The first Hague Peace Conference has therefore made an epoch in the history of International Law.

Work of
the second
Hague
Peace Con-
ference
and the
Naval
Confer-
ence of
London.

§ 32. Shortly after the Hague Peace Conference of 1899, the United States of America took a step with regard to sea warfare similar to that taken by her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title “The Laws and Usages of War at Sea”—the so-called “United States Naval War Code”—which was drafted by Captain Charles H. Stockton, of the United States Navy.

Although, on February 4, 1904, this code was by authority of the President of the United States withdrawn it provided the starting-point of a movement for codification of maritime International Law. No complete Naval War Code agreed upon by the Powers has as yet made its appearance, but the second Hague Peace Conference of 1907 and the Naval Conference of London of 1908-9 have produced a number of law-

making treaties which represent codifications of several parts of maritime International Law.

The second Hague Peace Conference met in 1907 and produced not less than thirteen conventions and one declaration. This declaration prohibits the discharge of projectiles and explosives from balloons and takes the place of a corresponding declaration of the first Hague Peace Conference. And three of the thirteen conventions, namely that for the pacific settlement of international disputes, that concerning the laws and customs of war on land, and that concerning the adaptation of the principles of the Geneva Convention to maritime war, likewise take the place of three corresponding conventions of the first Hague Peace Conference. But the other ten conventions are entirely new and concern: the limitation of the employment of force for the recovery of contract debts, the opening of hostilities, the rights and duties of neutral Powers and persons in war on land, the status of enemy merchant ships at the outbreak of hostilities, the conversion of merchant ships into war ships, the laying of automatic submarine contact mines, bombardments by naval forces in time of war, restrictions on the exercise of the right of capture in maritime war, the establishment of a Prize Court, the rights and duties of neutral Powers in maritime war.

The Naval Conference of London which met in November 1908, and sat till February 1909, produced the Declaration of London, the most important law-making treaty as yet concluded. Its nine chapters deal with: blockade, contraband, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, convoy, resistance to search, compensation. The Declaration of London, when ratified, will make the establishment of an International Prize Court possible.

Value of
Codifica-
tion of
Inter-
national
Law con-
tested.

§ 33. In spite of the movement in favour of codification of the Law of Nations, there are many eminent jurists who oppose such codification. They argue that codification would never be possible on account of differences of languages and of technical juridical terms. They assert that codification would cut off the organic growth and future development of International Law. They postulate the existence of a permanent International Court with power of executing its verdicts as an indispensable condition, since without such a court no uniform interpretation of controversial parts of a code could be possible. Lastly, they maintain that the Law of Nations is not yet at present, and will not be for a long time to come, ripe for codification. Those jurists, on the other hand, who are in favour of codification argue that the customary Law of Nations to a great extent lacks precision and certainty, that writers on International Law differ in many points regarding its rules, and that, consequently, there is no broad and certain basis for the practice of the States to stand upon.

Merits of
Codifica-
tion in
general.

§ 34. I am decidedly not a blind and enthusiastic admirer of codification in general. It cannot be maintained that codification is everywhere, at all times, and under all circumstances opportune. Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to the individual merits of particular cases which come under it. It is further a fact, which cannot be denied, that together with codification there frequently enters into courts of justice and into the area of juridical literature a hair-splitting tendency and an interpretation of the law which often clings more to the letter and the word of the law than to its spirit and its principles. And it is not at all a fact that codification does away with controversies altogether. Codification

certainly clears up many questions of law which have been hitherto debatable, but it creates at the same time new controversies. And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed. The hands of legislators are very often clumsy, and legislation often does more harm than good. Yet, on the other hand, the fact must be recognised that history has given its verdict in favour of codification. There is no civilised State in existence whose Municipal Law is not to a greater or lesser extent codified. The growth of the law through custom goes on very slowly and gradually, very often too slowly to be able to meet the demands of the interests at stake. New interests and new inventions very often spring up with which customary law cannot deal. Circumstances and conditions frequently change so suddenly that the ends of justice are not met by the existing customary law of a State. Thus, legislation, which is, of course, always partial codification, becomes often a necessity in the face of which all hesitation and scruple must vanish. Whatever may be the disadvantages of codification, there comes a time in the development of every civilised State when it can no longer be avoided. And great are the advantages of codification, especially of a codification that embraces a large part of the law. Many controversies are done away with. The science of Law receives a fresh stimulus. A more uniform spirit enters into the law of the country. New conditions and circumstances of life become legally recognised. Mortifying principles and branches are cut off with one stroke. A great deal of fresh and healthy blood is brought into the arteries of the body of the law in its totality. If codification is carefully planned and prepared, if it is imbued with true and healthy conservatism, many disadvantages can be avoided. And interpre-

tation on the part of good judges can deal with many a fault that codification has made. If the worst comes to the worst, there is always a Parliament or another law-giving authority of the land to mend through further legislation the faults of previous codification.

Merits of
Codifica-
tion of
Inter-
national
Law.

§ 35. But do these arguments in favour of codification in general also apply to codification of the Law of Nations? I have no doubt that they do more or less. If some of these arguments have no force in view of the special circumstances of the existence of International Law and of the peculiarities of the Family of Nations, there are other arguments which take their place.

When opponents maintain that codification would never be practicable on account of differences of language and of technical juridical terms, I answer that this difficulty is only as great an obstacle in the way of codification as it is in the way of contracting international treaties. The fact that such treaties are concluded every day shows that difficulties which arise out of differences of language and of technical juridical terms are not at all insuperable.

Of more weight than this is the next argument of opponents, that codification of the Law of Nations would cut off its organic growth and future development. It cannot be denied that codification always interferes with the growth of customary law, although the assertion is not justified that codification does *cut off* such growth. But this disadvantage can be met by periodical revisions of the code and by its gradual increase and improvement through enactment of additional and amending rules according to the wants and needs of the days to come.

When opponents postulate an international court with power of executing its verdicts as an indispensable condition of codification, I answer that the non-

existence of such a court is quite as much or as little an argument against codification as against the very existence of International Law. If there is a Law of Nations in existence in spite of the non-existence of an international court to guarantee its realisation, I cannot see why the non-existence of such a court should be an obstacle to codifying the very same Law of Nations. It may indeed be maintained that codification is all the more necessary as such an international court does not exist. For codification of the Law of Nations and the solemn recognition of a code by a universal law-making international treaty would give more precision, certainty, and weight to the rules of the Law of Nations than they have now in their unwritten condition. And a uniform interpretation of a code is now, since the first Hague Peace Conference has instituted a Permanent Court of Arbitration, and since the second Peace Conference has resolved upon the establishment of an International Prize Court, much more realisable than in former times, although these courts will never have the power of executing their verdicts.

But is the Law of Nations ripe for codification? I readily admit that there are certain parts of that law which would offer the greatest difficulty, and which therefore had better remain untouched for the present. But there are other parts, and I think that they constitute the greater portion of the Law of Nations, which are certainly ripe for codification. There can be no doubt that, whatever can be said against codification of the whole of the Law of Nations, partial codification is possible and comparatively easy. The work done by the Institute of International Law, and published in the "*Annuaire de l'Institut de Droit International*," gives evidence of it. And the number and importance of the law-making treaties produced by the Hague Peace Conferences and the Maritime

Conference of London, 1908-9, should leave no doubt as to the feasibility of such partial codification.

How Codification could be realised.

§ 36. However, although possible, codification could hardly be realised at once. The difficulties, though not insuperable, are so great that it would take the work of perhaps a generation of able jurists to prepare draft codes for those parts of International Law which may be considered ripe for codification. The only way in which such draft codes could be prepared consists in the appointment on the part of the Powers of an international committee composed of a sufficient number of able jurists, whose task would be the preparation of the drafts. Public opinion of the whole civilised world would, I am sure, watch the work of these men with the greatest interest, and the Parliaments of the civilised States would gladly vote the comparatively small sums of money necessary for the costs of the work. But in proposing codification it is necessary to emphasise that it does not necessarily involve a reconstruction of the present international order and a recasting of the whole system of International Law as it at present stands. Naturally, a codification would in many points mean not only an addition to the rules at present recognised, but also the repeal, alteration, and reconstruction of some of these rules. Yet, however this may be, I do not believe that a codification ought to be or could be undertaken which would revolutionise the present international order and put the whole system of International Law on a new basis. The codification which I have in view is one that would embody the existing rules of International Law together with such modifications and additions as are necessitated by the conditions of the age and the very fact of codification being taken in hand. If International Law, as at present recognised, is once codified, nothing prevents reformers from making proposals which could be realised by successive codification.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I

DEVELOPMENT OF THE LAW OF NATIONS BEFORE GROTIUS

Lawrence, §§ 20-29—Manning, pp. 8-20—Halleck, I. pp. 1-11—Walker, History, I. pp. 30-137—Taylor, §§ 6-29—Ullmann, §§ 12-14—Holtzendorff in Holtzendorff, I. pp. 159-386—Nys, I. pp. 1-18—Martens, I. §§ 8-20—Fiore, I. Nos. 3-31—Calvo, I. pp. 1-32—Bonfilis, Nos. 71-86—Despagnet, Nos. 1-19—Mérignhac, I. pp. 38-43—Laurent, "Histoire du Droit des Gens," &c., 14 vols. (2nd ed. 1861-1868)—Ward, "Enquiry into the Foundation and History of the Law of Nations," 2 vols. (1795)—Osenbrüggen, "De Jure Belli ac Pacis Romanorum" (1876)—Müller-Jochmus, "Geschichte des Völkerrechts im Alterthum" (1848)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 1-226—Nys, "Le Droit de la Guerre et les Précurseurs de Grotius" (1882) and "Les Origines du Droit International" (1894)—Hill, "History of Diplomacy in the International Development of Europe," vol. I. (1905) and vol. II. (1906)—Cybichowski, "Das antike Völkerrecht" (1907)—Phillipson, "The International Law and Custom of Ancient Greece and Rome," 2 vols. (1910)—Strupp, "Urkunden zur Geschichte des Völkerrechts," 2 vols. (1911).

§ 37. International Law as a law between Sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be hardly four hundred years old. However, the roots of this law go very far back into history. Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations. But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own religion and gods, its own language, law, and morality. International interests of sufficient vigour to wind a band around all

No Law of Nations in antiquity.

the civilised States, bring them nearer to each other, and knit them together into a community of nations, did not spring up in antiquity. On the other hand, however, no nation could avoid coming into contact with other nations. War was waged and peace concluded. Treaties were agreed upon. Occasionally ambassadors were sent and received. International trade sprang up. Political partisans whose cause was lost often fled their country and took refuge in another. And, just as in our days, criminals often fled their country for the purpose of escaping punishment.

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly congruent rules and usages to be observed with regard to external relations. These rules and usages were considered under the protection of the gods ; their violation called for religious expiation. It will be of interest to throw a glance at the respective rules and usages of the Jews, Greeks, and Romans.

The Jews.

§ 38. Although they were monotheists and the standard of their ethics was consequently much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except so far as they afforded foreigners living on Jewish territory equality before the law. Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals. If we compare the different parts of the Bible concerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, as the Amalekites, for example, with whom they declined to have any relations whatever in peace. When they went to war with those nations, their practice was extremely

cruel. They killed not only the warriors on the battlefield, but also the aged, the women, and the children in their homes. Read, for example, the short description of the war of the Jews against the Amalekites in 1 Samuel xv., where we are told that Samuel instructed King Saul as follows : (3) " Now go and smite Amalek, and utterly destroy all that they have, and spare them not ; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." King Saul obeyed the injunction, save that he spared the life of Agag, the Amalekite king, and some of the finest animals. Then we are told that the prophet Samuel rebuked Saul and " hewed Agag in pieces with his own hand." Or again, in 2 Samuel xii. 31, we find that King David, " the man after God's own heart," after the conquest of the town of Rabbah, belonging to the Ammonites, " brought forth the people that were therein and put them under saws, and under harrows of iron, and made them pass through the brick-kiln. . . ."

With those nations, however, of which they were not sworn enemies the Jews used to have international relations. And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings. Thus we find in Deuteronomy xx. 10-14 the following rules :—

(10) " When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

(11) " And it shall be, if it make thee answer of peace and open unto thee, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

(12) " And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it.

(13) " And when the Lord thy God hath delivered

it into thine hands, thou shalt smite every male thereof with the edge of the sword.

(14) "But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee."

Comparatively mild, like these rules for warfare, were the Jewish rules regarding their foreign slaves. Such slaves were not without legal protection. The master who killed a slave was punished (Exodus ii. 20); if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus ii. 26 and 27). (The Jews, further, allowed foreigners to live among them under the full protection of their laws.) "Love . . . the stranger, for ye were strangers in the land of Egypt," says Deuteronomy x. 19, and in Leviticus xxiv. 22 there is the command: "You shall have one manner of law, as well for the stranger as for one of your own country."

Of the greatest importance, however, for the International Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national only, but fully *international*. The following are the beautiful words in which the prophet Isaiah (ii. 2-4) foretells the state of mankind when the Messiah shall have appeared:

(2) "And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the top of the mountains, and shall be exalted above the hills; and all nations shall flow unto it.

(3) "And many people shall go and say, Come ye, and let us go up to the mountain of the Lord, to the house of the God of Jacob, and he will teach us of his ways, and we will walk in his paths; for out of Zion shall go forth the law, and the word of the Lord from Jerusalem.

(4) "And he shall judge among the nations, and shall rebuke many people: and they shall beat their swords into plowshares, and their spears into pruning-hooks: nation shall not lift up sword against nation, neither shall they learn war any more."

Thus we see that the Jews, at least at the time of Isaiah, had a foreboding and presentiment of a future when all the nations of the world should be united in peace. And the Jews have given this ideal to the Christian world. It is the same ideal which has in bygone times inspired all those eminent men who have laboured to build up an International Law. And it is again the same ideal which nowadays inspires all lovers of international peace. Although the Jewish State and the Jews as a nation have practically done nothing to realise that ideal, yet it sprang up among them and has never disappeared.

§ 39. Totally different from this Jewish contribution to a future International Law is that of the Greeks. The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon those neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity. But the Greeks before the Macedonian conquest were never united into one powerful national State. (They lived in numerous more or less small city States, which were totally independent of one another.) It is this very fact which, as time went on, called into existence a kind of International Law between these independent States. They could never forget that their inhabitants were of the same race. The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should say nowadays—Sovereign States into a community of States which in time of peace and war

The
Greeks.

held themselves bound to observe certain rules as regards the relations between one another. The consequence was that the practice of the Greeks in their wars among themselves was a very mild one. It was a rule that war should never be commenced without a declaration of war. Heralds were inviolable. Warriors who died on the battlefield were entitled to burial. If a city was captured, the lives of all those who took refuge in a temple had to be spared. War prisoners could be exchanged or ransomed; their lot was, at the utmost, slavery. Certain places, as, for example, the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as, for instance, the priests, who carried the holy fire, and the seers.

Thus the Greeks left to history the example that independent and Sovereign States can live, and are in reality compelled to live, in a community which provides a law for the international relations of the member-States, provided that there exist some common interests and aims which bind these States together. It is very often maintained that this kind of International Law of the Greek States could in no way be compared with our modern International Law, as the Greeks did not consider their international rules as legally, but as religiously binding only. We must, however, not forget that the Greeks never made the same distinction between law, religion, and morality which the modern world makes. The fact itself remains unshaken that the Greek States set an example to the future that independent States can live in a community in which their international regulations are governed by certain rules and customs based on the common consent of the members of that community.

tribution to a future International Law is that of the Romans. As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular but a divine and holy law, a *jus sacrale*, the so-called *jus fetiale*. The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or of alliance were concluded, when the Romans had an international claim before a foreign State, or *vice versa*.

According to Roman Law the relations of the Romans with a foreign State depended upon the fact whether or not there existed a treaty of friendship between Rome and the respective State. In case no such treaty was in existence, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods going from the land of the Romans into the foreign land, enjoyed no legal protection whatever. Such persons could be made slaves, and such goods could be seized, and became the property of the captor. Should such an enslaved person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii*. An exception was made as regards ambassadors. They were always considered inviolable, and whoever violated them was handed over to the home State of those ambassadors to be punished according to discretion.

Different were the relations when a treaty of friendship existed. Persons and goods coming from one country into the other stood then under legal protection. So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium* in contradistinction to the *jus civile*. And a special magistrate, the *praetor*

peregrinus, was nominated for the administration of that law. Of such treaties with foreign nations there were three different kinds, namely, of *friendship* (*amicitia*), of *hospitality* (*hospitium*), or of *alliance* (*foedus*). I do not propose to go into details about them. It suffices to remark that, although the treaties were concluded without any such provision, notice of termination could be given. Very often these treaties used to contain a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*.

Very precise legal rules existed as regards war and peace. Roman law considered war a legal institution. There were four different just reasons for war, namely: (1) Violation of the Roman dominion; (2) violation of ambassadors; (3) violation of treaties; (4) support given during war to an opponent by a hitherto friendly State. But even in such cases war was only justified if satisfaction was not given by the foreign State. Four *fetiales* used to be sent as ambassadors to the foreign State from which satisfaction was asked. If such satisfaction was refused, war was formally declared by one of the *fetiales* throwing a lance from the Roman frontier into the foreign land. For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans. Legal rules existed, however, for the end of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (*deditio*). Such surrender spared the enemy their lives and property. War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*). It was in this case that the Romans could act according to discretion with the lives and the property of the enemy.

From this sketch of their rules concerning external

relations, it becomes apparent that the Romans gave to the future the example of a State with legal rules for its foreign relations. As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations.

§ 41. The Roman Empire gradually absorbed nearly the whole civilised ancient world, so far as it was known to the Romans. They hardly knew of any independent civilised States outside the borders of their empire. There was, therefore, neither room nor need for an International Law as long as this empire existed. It is true that at the borders of this world-empire there were always wars, but these wars gave opportunity for the practice of a few rules and usages only. And matters did not change when under Constantine the Great (313-337) the Christian faith became the religion of the empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empire. This Western Empire disappeared in 476, when Romulus Augustus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy. The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction. In Gallia the kingdom of the Franks springs up in 486 under Chlodovech the Merovingian. In Italy, the kingdom of the Ostrogoths under Theoderich the Great, who defeated Odoacer, rises in 493. In Spain the kingdom of the Visigoths appears in 507. The Vandals had, as early as in 429,

No need
for a Law
of Nations
during the
Middle
Ages.

erected a kingdom in Africa, with Carthage as its capital. The Saxons had already gained a footing in Britannia in 449.

All these peoples were barbarians in the strict sense of the term. Although they had adopted Christianity, it took hundreds of years to raise them to the standard of a more advanced civilisation. And, likewise, hundreds of years passed before different nations came to light out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that empire. It was in the eighth century that matters became more settled. Charlemagne built up his vast Frankish Empire, and was, in 800, crowned Roman Emperor by Pope Leo III. Again the whole world seemed to be one empire, headed by the Emperor as its temporal, and by the Pope as its spiritual, master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long. According to the Treaty of Verdun, it was, in 843, divided into three parts, and with that division the process of development set in, which led gradually to the rise of the several States of Europe.

In theory the Emperor of the Germans remained for hundreds of years to come the master of the world, but in practice he was not even master at home, as the German Princes step by step succeeded in establishing their independence. And although theoretically the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on. War practice was the most cruel possible. It is true that the Pope and the Bishops succeeded sometimes in mitigating such practice, but as a rule there was no influence of the Christian teaching visible.

arise until a multitude of States absolutely independent of one another had successfully established themselves. The process of development, starting from the Treaty of Verdun of 843, reached that climax with the reign of Frederic III., Emperor of the Germans from 1440 to 1493. He was the last of the emperors crowned in Rome by the hands of the Popes. At that time Europe was, in fact, divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these Sovereign States. Seven factors of importance prepared the ground for the growth of principles of a future International Law.

Sixteenth
Centuries.

(1) There were, first, the Civilians and the Canonists. Roman Law was in the beginning of the twelfth century brought back to the West through Irnerius, who taught this law at Bologna. He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, the law *par excellence*. These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the emperors of the Germans being the successors of the emperors of Rome. Their commentaries to the *Corpus Juris Civilis* touch upon many questions of the future International Law which they discuss from the basis of Roman Law.

The Canonists, on the other hand, whose influence was unshaken till the time of the Reformation, treated from a moral and ecclesiastical point of view many questions of the future International Law concerning war.¹

(2) There were, secondly, collections of Maritime Law of great importance which made their appearance in connection with international trade. From the eighth century the world trade, which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation

¹ See Holland, *Studies*, pp. 40-58; Walker, *History*, I. pp. 204-212.

during the period of the Migration of the Peoples, began slowly to develop again. The sea trade specially flourished and fostered the growth of rules and customs of Maritime Law, which were collected into codes and gained some kind of international recognition. The more important of these collections are the following : The Consolato del Mare, a private collection made at Barcelona in Spain in the middle of the fourteenth century ; the Laws of Oléron, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France ; the Rhodian Laws, a very old collection of maritime laws which probably was put together between the sixth and the eighth centuries ;¹ the Tabula Amalfitana, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century ; the Leges Wisbuenses, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century.

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of an International Law (see below, §§ 248-250).

(3) A third factor was the numerous leagues of trading towns for the protection of their trade and trading citizens. The most celebrated of these leagues is the Hanseatic, formed in the thirteenth century. These leagues stipulated for arbitration on controversies between their member towns. They acquired trading privileges in foreign States. They even waged war, when necessary, for the protection of their interests.

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations. In the Middle Ages the Pope alone had a permanent legation at the court of the Frankish kings.

¹ See Ashburner, "The Rhodian Sea Law" (1909), Introduction, p. cxii.

Later, the Italian Republics, as Venice and Florence for instance, were the first States to send out ambassadors, who took up their residence for several years in the capitals of the States to which they were sent. At last, from the end of the fifteenth century, it became a universal custom for the kings of the different States to keep permanent legations at one another's capital. The consequence was that an uninterrupted opportunity was given for discussing and deliberating common international interests. And since the position of ambassadors in foreign countries had to be taken into consideration, international rules concerning inviolability and extraterritoriality of foreign envoys gradually grew up.

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which also dates from the fifteenth century. The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare.

(6) A sixth factor was the Renaissance and the Reformation. The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and aesthetical ideals of Greek life and transferred them to modern life. Through their influence the spirit of the Christian religion took precedence of its letter. The conviction awoke everywhere that the principles of Christianity ought to unite the Christian-world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national. The Reformation, on the other hand, put an end to the spiritual-mastership of the Pope over the civilised world. Protestant States could not recognise the claim of the Pope to arbitrate as of right in their conflicts either between one another or between themselves and Catholic States.

(7) A seventh factor made its appearance in connection with the schemes for the establishment of eternal peace which arose from the beginning of the fourteenth century. Although these schemes were utopian, they nevertheless must have had great influence by impressing upon the Princes and the nations of Christendom the necessity for some kind of organisation of the numerous independent States into a community. The first of these schemes was that of the French lawyer, Pierre Dubois, who, as early as 1306, in "De Recuperatione Terre Sancte" proposed an alliance between all Christian Powers for the purpose of the maintenance of peace and the establishment of a Permanent Court of Arbitration for the settlement of differences between the members of the alliance.¹ Another project arose in 1461, when Podiebrad, King of Bohemia from 1420–1471, adopted the scheme of his Chancellor, Antoine Marini, and negotiated with foreign courts the foundation of a Federal State to consist of all the existing Christian States with a permanent Congress, seated at Basle, of ambassadors of all the member States as the highest organ of the Federation.² A third plan was that of Sully, adopted by Henri IV. of France, which proposed the division of Europe into fifteen States and the linking together of these into a federation with a General Council as its highest organ, consisting of Commissioners deputed by the member States.³ A fourth project was that of Émeric Crucée, who, in 1623, proposed the establishment of a Union consisting not only of the Christian States but of all States then exist-

¹ See Meyer, "Die Staats- und völkerrechtlichen Ideen von Pierre Dubois" (1909); Schücking, "Die Organisation der Welt" (1909), pp. 28–30; Vesnitch, "Deux Précurseurs Français du Pacifisme, etc." (1911), pp. 1–29.

² See Schwitzky, "Der Europäische Fürstenbund Georg's von

Podiebrad" (1909), and Schücking, "Die Organisation der Welt" (1909), pp. 32–36.

³ See Nys, "Études de Droit International et de Droit Politique" (1896), pp. 301–306, and Darby, "International Arbitration" (4th ed. 1904), pp. 10–21.

ing in the whole of the world, with a General Council as its highest organ, seated at Venice, and consisting of ambassadors of all the member States of the Union.¹

II

DEVELOPMENT OF THE LAW OF NATIONS AFTER GROTIUS

Lawrence, §§ 29-53, and Essays, pp. 147-190—Halleck, I. pp. 12-45—Walker, History, I. pp. 138-202—Taylor, §§ 65-95—Nys, I. pp. 19-46—Martens, I. §§ 21-33—Fiore, I. Nos. 32-52—Calvo, I. pp. 32-101—Bonfils, Nos. 87-146—Despagnet, Nos. 20-27—Mérignhac, I. pp. 43-78—Ullmann §§ 15-17—Laurent, "Histoire du Droit des Gens, &c.," 14 vols. (2nd ed. 1861-1868)—Wheaton, "Histoire des Progrès du Droit des Gens en Europe" (1841)—Bulmerincq, "Die Systematik des Völkerrechts" (1858)—Pierantoni, "Storia del diritto internazionale nel secolo XIX." (1876)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 227-320—Brie, "Die Fortschritte des Völkerrechts seit dem Wiener Congress" (1890)—Gareis, "Die Fortschritte des internationalen Rechts im letzten Menschenalter" (1905)—Dupuis, "Le Principe d'Équilibre et le Concert Européen de la Paix de Westphalie à l'Acte d'Algésiras" (1909)—Strupp, "Urkunden zur Geschichte des Völkerrechts," 2 vols. (1911).

§ 43. The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius's work "De Jure Belli ac Pacis" The time of Grotius.

¹ See Balch, "Le Nouveau Cynée de Émeric Crucée" (1909); Darby, "International Arbitration" (4th ed. 1904), pp. 22-33; Vesnitch, "Deux Précurseurs Français du Pacifism, etc." (1911), pp. 29-54.

The schemes enumerated in the text are those which were advanced before the appearance of Grotius's work "De Jure Belli ac Pacis" (1625). The numerous plans which made their appearance afterwards—that of the Landgrave of Hesse-Rheinfels, 1666; of Charles, Duke of Lorraine, 1688; of William Penn, 1693; of John Bellers, 1710; of the Abbé de St. Pierre (1658-1743); of Kant, 1795; and of others—are all discussed in Schücking, "Die Organisa-

tion der Welt" (1909), and Darby, "International Arbitration" (4th ed. 1904). They are as utopian as the pre-Grotian schemes, but they are nevertheless of great importance. They preached again and again the gospel of the organisation of the Family of Nations, and although their ideal has not been and can never be realised, they drew the attention of public opinion to the fact that the international relations of States should not be based on arbitrariness and anarchy, but on rules of law and comity. And thereby they have indirectly influenced the gradual growth of rules of law for these international relations.

libri III.," which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international. Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the "Father of the Law of Nations." It would be very misleading and in no way congruent with the facts of history to believe that Grotius's doctrines were as a body at once universally accepted. No such thing happened, nor could have happened. What did soon take place was that, whenever an international question of legal importance arose, Grotius's book was consulted, and its authority was so overwhelming that in many cases its rules were considered right. How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations is a process of development which in each single phase cannot be ascertained. It can only be stated that at the end of the seventeenth century the civilised States considered themselves bound by a Law of Nations the rules of which were to a great extent the rules of Grotius. This does not mean that these rules have from the end of that century never been broken. On the contrary, they have frequently been broken. But whenever this occurred, the States concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them. And the development of the Law of Nations did

not come to a standstill with the reception of the bulk of the rules of Grotius. More and more rules were gradually required and therefore gradually grew. All the historically important events and facts of international life from the time of Grotius down to our own have, on the one hand, given occasion to the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually develop into a more perfect and more complete system of legal rules.

It serves the purpose to divide the history of the development of the Law of Nations from the time of Grotius into seven periods—namely, 1648–1721, 1721–1789, 1789–1815, 1815–1856, 1856–1874, 1874–1899, 1899–1911.

§ 44. The ending of the Thirty Years' War through the Westphalian Peace of 1648 is the first event of great importance after the death of Grotius in 1645. What makes remarkable the meetings of Osnaburg, where the Protestant Powers met, and Münster, where the Catholic Powers met, is the fact that there was for the first time in history a European Congress assembled for the purpose of settling matters international by common consent of the Powers. With the exception of England, Russia, and Poland, all the important Christian States were represented at this congress, as were also the majority of the minor Powers. The arrangements made by this congress show what a great change had taken place in the condition of matters international. The Swiss Confederation and the Netherlands were recognised as independent States. The 355 different States which belonged to the German Empire were practically, although not theoretically, recognised as independent States which formed a Confederation under the Emperor as its head. Of these 355 States, 150 were secular States governed by hereditary monarchs

The period
1648–
1721.

(Electors, Dukes, Landgraves, and the like), 62 were free-city States, and 123 were ecclesiastical States governed by archbishops and other Church dignitaries. The theory of the unity of the civilised world under the German Emperor and the Pope as its temporal and spiritual heads respectively was buried for ever. A multitude of recognised independent States formed a community on the basis of equality of all its members. The conception of the European equilibrium¹ made its appearance and became an implicit principle as a guaranty of the independence of the members of the Family of Nations. Protestant States took up their position within this family along with Catholic States, as did republics along with monarchies.

In the second half of the seventeenth century the policy of conquest initiated by Louis XIV. of France led to numerous wars. But Louis XIV. always pleaded a just cause when he made war, and even the establishment of the ill-famed so-called Chambers of Reunion (1680–1683) was done under the pretext of law. There was no later period in history in which the principles of International Law were more frivolously violated, but the violation was always cloaked by some excuse. Five treaties of peace between France and other Powers during the reign of Louis XIV. are of great importance. (1) The Peace of the Pyrenees, which ended in 1659 the war between France and Spain, who had not come to terms at the Westphalian Peace. (2) The Peace of Aix-la-Chapelle, which ended in 1668 another war between France and Spain, commenced in 1667 because France claimed the Spanish Netherlands from Spain. This peace was forced upon Louis XIV. through the triple alliance between England, Holland, and Sweden. (3) The Peace of Nymeguen, which ended in 1678 the war originally commenced by Louis XIV.

¹ See below, pp. 64, 65, 80, 193, 307.

in 1672 against Holland, into which many other European Powers were drawn. (4) The Peace of Ryswick, which ended in 1697 the war that had existed since 1688 between France on one side, and, on the other, England, Holland, Denmark, Germany, Spain, and Savoy. (5) The Peace of Utrecht, 1713, and the Peace of Rastadt and Baden, 1714, which ended the war of the Spanish Succession that had lasted since 1701 between France and Spain on the one side, and, on the other, England, Holland, Portugal, Germany, and Savoy.

But wars were not only waged between France and other Powers during this period. The following treaties of peace must therefore be mentioned :—(1) The Peaces of Roeskild (1658), Oliva (1660), Copenhagen (also 1660), and Kardis (1661). The contracting Powers were Sweden, Denmark, Poland, Prussia, and Russia. (2) The Peace of Carlowitz, 1699, between Turkey, Austria, Poland, and Venice. (3) The Peace of Nystaedt, 1721, between Sweden and Russia under Peter the Great.

The year 1721 is epoch-making because with the Peace of Nystaedt Russia enters as a member into the Family of Nations, in which she at once held the position of a Great Power. The period ended by the year 1721 shows in many points progressive tendencies regarding the Law of Nations. Thus the right of visit and search on the part of belligerents over neutral vessels becomes recognised. The rule “free ships, free goods,” rises as a postulate, although it was not universally recognised till 1856. The effectiveness of blockades, which were first made use of in war by the Netherlands at the end of the sixteenth century, rose as a postulate and became recognised in treaties between Holland and Sweden (1667) and Holland and England (1674), although its universal recognition was not realised until the nineteenth century. The freedom of the high seas, claimed by Grotius and others, began gradu-

ally to obtain recognition in practice, although it did likewise not meet with universal acceptance till the nineteenth century. The balance of power is solemnly recognised by the Peace of Utrecht as a principle of the Law of Nations.

The period
1721–
1789.

§ 45. Before the end of the first half of the eighteenth century peace in Europe was again disturbed. The rivalry between Austria and Prussia, which had become a kingdom in 1701 and the throne of which Frederick II. had ascended in 1740, led to several wars in which England, France, Spain, Bavaria, Saxony, and Holland took part. Several treaties of peace were successively concluded which tried to keep up or re-establish the balance of power in Europe. The most important of these treaties are: (1) The Peace of Aix-la-Chapelle of 1748 between France, England, Holland, Austria, Prussia, Sardinia, Spain, and Genoa. (2) The Peace of Hubertsburg and the Peace of Paris, both of 1763, the former between Prussia, Austria, and Saxony, the latter between England, France, and Spain. (3) The Peace of Versailles of 1783 between England, the United States of America, France, and Spain.

These wars gave occasion to disputes as to the right of neutrals and belligerents regarding trade in time of war. Prussia became a Great Power. The so-called First Armed Neutrality¹ made its appearance in 1780 with claims of great importance, which were not generally recognised till 1856. The United States of America succeeded in establishing her independence and became a member of the Family of Nations, whose future attitude fostered the growth of several rules of International Law.

The period
1789–
1815.

§ 46. All progress, however, was endangered, and indeed the Law of Nations seemed partly non-existent,

¹ See below, Vol. II, §§ 289 and 290, where details concerning the First and Second Armed Neutrality are given.

during the time of the French Revolution and the Napoleonic wars. Although the French Convention resolved in 1792 (as stated above, § 30) to create a "Declaration of the Rights of Nations," the Revolutionary Government and afterwards Napoleon I. very often showed no respect for the rules of the Law of Nations. The whole order of Europe, which had been built up by the Westphalian and subsequent treaties of peace for the purpose of maintaining a balance of power, was overthrown. Napoleon I. was for some time the master of Europe, Russia and England excepted. He arbitrarily created States and suppressed them again. He divided existing States into portions and united separate States. The kings depended upon his goodwill, and they had to follow orders when he commanded. Especially as regards maritime International Law, a condition of partial lawlessness arose during this period. Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention of subduing her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods. Again Napoleon, who wanted to ruin England by destroying her commerce, announced in 1806 in his Berlin Decrees the boycott of all English goods. England answered with the blockade of all French ports and all ports of the allies of France, and ordered her fleet to capture all ships destined to any such port.

When at last the whole of Europe was mobilised against Napoleon and he was finally defeated, the whole face of Europe was changed, and the former order of things could not possibly be restored. It was the task of the European Congress of Vienna in 1814 and 1815 to create a new order and a fresh balance of power. This new order comprised chiefly the following arrange-

ments:—The Prussian and the Austrian monarchies were re-established, as was also the Germanic Confederation, which consisted henceforth of thirty-nine member States. A kingdom of the Netherlands was created out of Holland and Belgium. Norway and Sweden became a Real Union. The old dynasties were restored in Spain, in Sardinia, in Tuscany, and in Modena, as was also the Pope in Rome. To the nineteen cantons of the Swiss Confederation were added those of Geneva, Valais, and Neuchâtel, and this Confederation was neutralised for all the future.

But the Vienna Congress did not only establish a new political order in Europe, it also settled some questions of International Law. Thus, free navigation was agreed to on so-called international rivers, which are rivers navigable from the Open Sea and running through the land of different States. It was further arranged that henceforth diplomatic agents should be divided into three classes (Ambassadors, Ministers, *Chargés d’Affaires*). Lastly, a universal prohibition of the trade in negro slaves was agreed upon.

The
period
1815–
1856.

§ 47. The period after the Vienna Congress begins with the so-called Holy Alliance. Already on September 26, 1815, before the second Peace of Paris, the Emperors of Russia and Austria and the King of Prussia called this alliance into existence, the object of which was to make it a duty upon its members to apply the principles of Christian morality in the administration of the home affairs of their States as well as in the conduct of their international relations. After the Vienna Congress the sovereigns of almost all the European States had joined that alliance with the exception of England. George IV., at that time prince-regent only, did not join, because the Holy Alliance was an alliance not of the States, but of sovereigns, and therefore was concluded without the signatures of the respec-

tive responsible Ministers, whereas according to the English Constitution the signature of such a responsible Minister would have been necessary.

The Holy Alliance had not as such any importance for International Law, for it was a religious, moral, and political, but scarcely a legal alliance. But at the Congress of Aix-la-Chapelle in 1818, which the Emperors of Russia and Austria and the King of Prussia attended in person, and where it might be said that the principles of the Holy Alliance were practically applied, the Great Powers signed a Declaration,¹ in which they solemnly recognised the Law of Nations as the basis of all international relations, and in which they pledged themselves for all the future to act according to its rules. The leading principle of their politics was that of legitimacy,² as they endeavoured to preserve everywhere the old dynasties and to protect the sovereigns of the different countries against revolutionary movements of their subjects. This led, in fact, to a dangerous neglect of the principles of International Law regarding intervention. The Great Powers, with the exception of England, intervened constantly with the domestic affairs of the minor States in the interest of the legitimate dynasties and of an anti-liberal legislation. The Congresses at Troppau, 1820, Laibach, 1821, Verona, 1822, occupied themselves with a deliberation on such interventions.

The famous Monroe Doctrine (see below, § 139) owes its origin to that dangerous policy of the European Powers as regards intervention, although this doctrine embraces other points besides intervention. As from 1810 onwards the Spanish colonies in South America were falling off from the mother country and declaring their independence, and as Spain was, after the Vienna

¹ See Martens, N.R. IV. p. 560.

² See Brockhaus, "Das Legitimitätsprincip" (1868).

Congress, thinking of reconquering these States with the help of other Powers who upheld the principle of legitimacy, President Monroe delivered his message on December 2, 1823, which pointed out amongst other things, that the United States could not allow the interference of a European Power with the States of the American continent.

Different from the intervention of the Powers of the Holy Alliance in the interest of legitimacy were the two interventions in the interest of Greece and Belgium. England, France, and Russia intervened in 1827 in the struggle of Turkey with the Greeks, an intervention which led finally in 1830 to the independence of Greece. And the Great Powers of the time, namely, England, Austria, France, Prussia, and Russia, invited by the provisional Belgian Government, intervened in 1830 in the struggle of the Dutch with the Belgians and secured the formation of a separate Kingdom of Belgium.

It may be maintained that the establishment of Greece and Belgium inferred the breakdown of the Holy Alliance. But it was not till the year 1848 that this alliance was totally swept away through the disappearance of absolutism and the victory of the constitutional system in most States of Europe. Shortly afterwards, in 1852, Napoleon III., who adopted the principle of nationality,¹ became Emperor of France. Since he exercised preponderant influence in Europe, one may say that this principle of nationality superseded in European politics the principle of legitimacy.

The last event of this period is the Crimean War, which led to the Peace as well as to the Declaration of Paris in 1856. This war broke out in 1853 between Russia and Turkey. In 1854, England, France, and Sardinia joined Turkey, but the war continued never-

¹ See Bulmerincq, "Praxis, Theorie und Codification des Völkerrechts" (1874), pp. 53-70.

theless for another two years. Finally, however, Russia was defeated, a Congress assembled at Paris, where England, France, Austria, Russia, Sardinia, Turkey, and eventually Prussia, were represented, and peace was concluded in March 1856. In the Peace Treaty, Turkey is expressly received as a member into the Family of Nations. Of greater importance, however, is the celebrated Declaration of Paris regarding maritime International Law which was signed on April 16, 1856, by the delegates of the Powers that had taken part in the Congress. This declaration abolished privateering, recognised the rules that enemy goods on neutral vessels and that neutral goods on enemy vessels cannot be confiscated, and stipulated that a blockade in order to be binding must be effective. Together with the fact that at the end of the first quarter of the nineteenth century the principle of the freedom of the high seas¹ became universally recognised, the Declaration of Paris is a prominent landmark in the progress of the Law of Nations. The Powers that had not been represented at the Congress of Paris were invited to sign the Declaration afterwards, and the majority of the members of the Family of Nations did sign it before the end of the year 1856. The few States, such as the United States of America, Spain, Mexico, and others, which did not then sign,² have in practice since 1856 not acted in opposition to the Declaration, and one may therefore, perhaps, maintain that the Declaration of Paris has already become or will soon become universal International Law through custom. Spain and Mexico, however, signed the Declaration in 1907, as Japan had already done in 1886.

§ 48. The next period, the time from 1856 to 1874, The period
1856–
1874.

¹ See below, § 251.

² It should be mentioned that the United States did not sign the Declaration of Paris because it did

not go far enough, and did not interdict capture of private enemy vessels.

is of prominent importance for the development of the Law of Nations. Under the aegis of the principle of nationality, Austria turns in 1867 into the dual monarchy of Austria-Hungary, and Italy as well as Germany becomes united. The unity of Italy rises out of the war of France and Sardinia against Austria in 1859, and Italy ranges henceforth among the Great Powers of Europe. The unity of Germany is the combined result of three wars: that of Austria and Prussia in 1864 against Denmark on account of Schleswig-Holstein, that of Prussia and Italy against Austria in 1866, and that of Prussia and the allied South German States against France in 1870. The defeat of France in 1870 had the consequence that Italy took possession of the Papal States, whereby the Pope disappeared from the number of governing sovereigns.

The United States of America rise through the successful termination of the Civil War in 1865 to the position of a Great Power. Several rules of maritime International Law owe their further development to this war. And the instructions concerning warfare on land, published in 1863 by the Government of the United States, represent the first step towards codification of the Laws of War. In 1864, the Geneva Convention for the amelioration of the condition of soldiers wounded in armies in the field is, on the initiation of Switzerland, concluded by nine States, and in time almost all civilised States became parties to it. In 1868, the Declaration of St. Petersburg, interdicting the employment in war of explosive balls below a certain weight, is signed by many States. Since Russia in 1870 had arbitrarily shaken off the restrictions of Article 11 of the Peace Treaty of Paris of 1856 neutralising the Black Sea, the Conference of London, which met in 1871 and was attended by the representatives of the Powers which were parties to the Peace of Paris of 1856, solemnly

proclaimed "that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement." The last event in this period is the Conference of Brussels of 1874 for the codification of the rules and usages of war on land. Although the signed code was never ratified, the Brussels Conference was nevertheless epoch-making, since it showed the readiness of the Powers to come to an understanding regarding such a code.

§ 49. After 1874 the principle of nationality continues to exercise its influence as before. Under its aegis takes place the partial decay of the Ottoman Empire. The refusal of Turkey to introduce reforms regarding the Balkan population led in 1877 to war between Turkey and Russia, which was ended in 1878 by the peace of San Stefano. As the conditions of this treaty would practically have done away with Turkey in Europe, England intervened and a European Congress assembled at Berlin in June 1878 which modified materially the conditions of the Peace of San Stefano. The chief results of the Berlin Congress are :— (1) Servia, Roumania, Montenegro become independent and Sovereign States ; (2) Bulgaria becomes an independent principality under Turkish suzerainty ; (3) the Turkish provinces of Bosnia and Herzegovina come under the administration of Austria-Hungary ; (4) a new province under the name of Eastern Rumelia is created in Turkey and is to enjoy great local autonomy (according to an arrangement of the Conference of Constantinople in 1885–1886 a bond is created between Eastern Rumelia and Bulgaria by the appointment of the Prince of Bulgaria as governor of Eastern Rumelia) ; (5) free navigation on the Danube from the Iron Gates to its mouth in the Black Sea is proclaimed.

The period
1874–
1899.

In 1889 Brazil becomes a Republic and a Federal State (the United States of Brazil). In the same year the first Pan-American Congress meets at Washington.

In 1897 Crete revolts against Turkey, war breaks out between Greece and Turkey, the Powers interfere, and peace is concluded at Constantinople. Crete becomes an autonomous half-Sovereign State under Turkish suzerainty with Prince George of Greece as governor, who, however, retires in 1906.

In the Far East war breaks out in 1894 between China and Japan, on account of Korea. China is defeated, and peace is concluded in 1895 at Shimonoseki.¹ Japan henceforth ranks as a Great Power. That she must now be considered a full member of the Family of Nations becomes apparent from the treaties concluded soon afterwards by her with other Powers for the purpose of abolishing their consular jurisdiction within the boundaries of Japan.

In America the United States intervene in 1898 in the revolt of Cuba against the motherland, whereby war breaks out between Spain and the United States. The defeat of Spain secures the independence of Cuba through the Peace of Paris² of 1898. The United States acquires Porto Rico and other Spanish West Indian Islands, and, further, the Philippine Islands, whereby she becomes a colonial Power.

An event of great importance during this period is the Congo Conference of Berlin, which took place in 1884-1885, and at which England, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Sweden-Norway, and Turkey were represented. This conference stipulated freedom of commerce, interdiction of slave-trade, and neutralisation of the territories in the

¹ See Martens, N.R.G. 2nd Ser. XXI. (1897), p. 641.

² See Martens, N.R.G. 2nd Ser. XXXII. (1905), p. 74.

Congo district, and secured freedom of navigation on the rivers Congo and Niger. The so-called Congo Free State was recognised as a member of the Family of Nations.

A second fact of great importance during this period is the movement towards the conclusion of international agreements concerning matters of international administration. This movement finds expression in the establishment of numerous International Unions with special International Offices. Thus a Universal Telegraphic Union is established in 1875, a Universal Postal Union in 1878, a Union for the Protection of Industrial Property in 1883, a Union for the Protection of Works of Literature and Art in 1886, a Union for the Publication of Custom Tariffs in 1890. There were also concluded conventions concerning:—(1) Private International Law (1900 and 1902); (2) Railway transports and freights (1890); (3) the metric system (1875); (4) phylloxera epidemics (1878 and 1881); (5) cholera and plague epidemics (1893, 1896, &c.); (6) Monetary Unions (1865, 1878, 1885, 1892, 1893).

A third fact of great importance is that in this period a tendency arises to settle international conflicts more frequently than in former times by arbitration. Numerous arbitrations are actually taking place, and several treaties are concluded between different States stipulating the settlement by arbitration of all conflicts which might arise in future between the contracting parties.

The last fact of great importance which is epoch-making for ~~this~~ period is the Peace Conference of the Hague of 1899. This Conference produces, apart from three Declarations of minor importance, a Convention for the Pacific Settlement of International Conflicts, a Convention regarding the Laws and Customs of War on Land, and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Con-

vention. It also formulates, among others, the three wishes (1) that a conference should in the near future regulate the rights and duties of neutrals, (2) that a future conference should contemplate the declaration of the inviolability of private property in naval warfare, (3) that a future conference should settle the question of the bombardment of ports, towns, and villages by naval forces.

The
Twentieth
Century.

§ 50. Soon after the Hague Peace Conference, in October 1899, war breaks out in South Africa between Great Britain and the two Boer Republics, which leads to the latter's subjugation at the end of 1901. The assassination on June 10, 1900, of the German Minister and the general attack on the foreign legations at Peking necessitate united action of the Powers against China for the purpose of vindicating this violation of the fundamental rules of the Laws of Nations. Friendly relations are, however, re-established with China on her submitting to the conditions enumerated in the Final Protocol of Peking,¹ signed on September 7, 1901. In December 1902 Great Britain, Germany, and Italy institute a blockade of the coast of Venezuela for the purpose of making her comply with their demands for the indemnification of their subjects wronged during civil wars in Venezuela, and the latter consents to pay indemnities to be settled by a mixed commission of diplomatists.² As, however, Powers other than those blockading likewise claim indemnities, the matter is referred to the Permanent Court of Arbitration at the Hague, which in 1904 gives its award³ in favour of the blockading Powers. In February 1904 war breaks out between Japan and Russia on account of Manchuria and Korea. Russia is defeated, and peace is concluded

¹ See Martens, N.R.G. 2nd Ser. XXXII. p. 94.

² See Martens, N.R.G. 3rd Ser. I. p. 46.

³ See Martens, N.R.G. 3rd Ser. I. p. 57.

through the mediation of the United States of America, on September 5, 1905, at Portsmouth.¹ Korea, now freed from the influence of Russia, places herself by the Treaty of Seoul² of November 17, 1905, under the protectorate of Japan. Five years later, however, by the Treaty of Seoul³ of August 22, 1910, she merges entirely into Japan.

The Real Union between Norway and Sweden, which was established by the Vienna Congress in 1815, is peacefully dissolved by the Treaty of Karlstad⁴ of October 26, 1905. Norway becomes a separate kingdom under Prince Charles of Denmark, who takes the name of Haakon VIII., and Great Britain, Germany, Russia, and France guarantee by the Treaty of Christiania⁵ of November 2, 1907, the integrity of Norway on condition that she would not cede any part of her territory to any foreign Power.

The rivalry between France and Germany—the latter protesting against the position conceded to France in Morocco by the Anglo-French agreement signed at London on April 8, 1904—leads in January 1906 to the Conference of Algeciras, in which Great Britain, France, Germany, Belgium, Holland, Italy, Austria-Hungary, Portugal, Russia, Sweden, Spain, and the United States of America take part, and where on April 7, 1906, the General Act of the International Conference of Algeciras⁶ is signed. This Act, which recognises, on the one hand, the independence and integrity of Morocco, and, on the other, equal commercial facilities for all nations in that country, contains:—(1) A declaration concerning the organisation of the Moroccan police; (2) regulations concerning the detection and suppression of the illicit

¹ See Martens, N.R.G. 2nd Ser. XXXIII. p. 3.

² See Martens, N.R.G. 2nd Ser. XXXIV. p. 727.

³ See Martens, N.R.G. 3rd Ser. IV. p. 24.

⁴ See Martens, N.R.G. 2nd Ser. XXXIV. p. 700.

⁵ See Martens, N.R.G. 3rd Ser. II. p. 9, and below, § 574.

⁶ See Martens, N.R.G. 2nd Ser. XXXIV. p. 238.

trade in arms ; (3) an Act of concession for a Moorish State Bank ; (4) a declaration concerning an improved yield of the taxes and the creation of new sources of revenue ; (5) regulations respecting customs and the suppression of fraud and smuggling ; (6) a declaration concerning the public services and public works. But it would seem that this Act has not produced a condition of affairs of any permanency. Since, in 1911, internal disturbances in Morocco led to military action on the part of France and Spain, Germany, in July of the same year, sent a man-of-war to the port of Agadir. Thus the Moroccan question has been reopened, and fresh negotiations for its settlement are taking place between the Powers.¹

Two events of importance occur in 1908. The first is the merging of the Congo Free State² into Belgium, which annexation is not as yet recognised by all the Powers. The other is the crisis in the Near East caused by the ascendancy of the so-called Young Turks and the introduction of a constitution in Turkey. Simultaneously on October 5, 1908, Bulgaria declares herself independent, and Austria-Hungary proclaims her sovereignty over Bosnia and Herzegovina, which two Turkish provinces had been under her administration since 1878. This violation of the Treaty of Berlin considerably endangers the peace of the world, and an international conference is proposed for the purpose of reconsidering the settlement of the Near Eastern question. Austria-Hungary, however, does not consent to this, but prefers to negotiate with Turkey alone in the matter, and a Protocol is signed by the two Powers on February 26, 1909, according to which Turkey receives a substantial indemnity in money and other concessions. Austria-

¹ It should be mentioned that by the Treaty of London of December 13, 1906, Great Britain, France, and Italy agree to co-operate in maintaining the independence and integrity

of Abyssinia ; see Martens, N.R.G. 2nd Ser. XXXV. p. 556.

² See Martens, N.R.G. 3rd Ser. II. p. 101.

Hungary negotiates likewise with Montenegro alone, and consents to the modifications in Article 29 of the Treaty of Berlin concerning the harbour of Antivary, which is to be freed from Austria-Hungarian control and is henceforth to be open to warships of all nations. Whereupon the demand for an international conference is abandoned and the Powers notify on April 7, 1909, their consent to the abolition of Article 25 and the amendment of Article 29 of the Treaty of Berlin.¹

In 1910 Portugal becomes a Republic; but the Powers, although they enter provisionally into communication with the *de facto* government, do not recognise the Republic until September 1911, after the National Assembly adopted the republican form of government.

In September 1911 war breaks out between Italy and Turkey, on account of the alleged maltreatment of Italian subjects in Tripoli.

International Law as a body of rules for the international conduct of States makes steady progress during this period. This is evidenced by congresses, conferences, and law-making treaties. Of conferences and congresses must be mentioned the second, third, and fourth Pan-American Congresses,² which take place at Mexico in 1901, at Rio in 1906, and at Buenos Ayres in 1910. Although the law-making treaties of these congresses have not found ratification, their importance cannot be denied. Further, in 1906 a conference assembles in Geneva for the purpose of revising the Geneva Convention of 1864 concerning the wounded in land warfare, and on July 6, 1906, the new Geneva³ Convention is signed. Of the greatest importance, however, are the second Hague Peace Conference of 1907 and the Naval Conference of London of 1898-9.

¹ See Martens, N.R.G. 3rd Ser. II. p. 606.

"Pan-America" (1910); Barrett, "The Pan-American Union" (1911).

² See Moore, VI. § 969; Fried,

³ See Martens, N.R.G. 3rd Ser. II. p. 323.

The second Peace Conference assembles at the Hague on June 15, 1907. Whereas at the first there were only 26 States represented, 44 are represented at the second Peace Conference. The result of this Conference is contained in its Final Act,¹ which is signed on October 18, 1907, and embodies no fewer than thirteen law-making Conventions besides a declaration of minor importance. Of these Conventions, 1, 4, and 10 are mere revisions of Conventions agreed upon at the first Peace Conference of 1899, but the others are new and concern :—The employment of force for the recovery of contract debts (2) ; the commencement of hostilities (3) ; the rights and duties of neutrals in land warfare (5) ; the status of enemy merchant-ships at the outbreak of hostilities (6) ; the conversion of merchantmen into men-of-war (7) ; the laying of submarine mines (8) ; the bombardment by naval forces (9) ; restrictions of the right of capture in maritime war (11) ; the establishment of an International Prize Court (12) ; the rights and duties of neutrals in maritime war (13).

The Naval Conference of London assembles on December 4, 1908, for the purpose of discussing the possibility of creating a code of prize law without which the International Prize Court, agreed upon at the second Hague Peace Conference, could not be established, and produces the Declaration of London, signed on February 26, 1909. This Declaration contains 71 articles, and settles in nine chapters the law concerning :—(1) Blockade ; (2) contraband ; (3) un-neutral service ; (4) destruction of neutral prizes ; (5) transfer to a neutral flag ; (6) enemy character ; (7) convoy ; (8) resistance to search ; and (9) compensation. The Declaration is accompanied by a General Report on its stipulations which is intended to serve as an official commentary.

¹ See Martens, N.R.G. 3rd Ser. III. p. 323.

The movement which began in the last half of the nineteenth century towards the conclusion of international agreements concerning matters of international administration, develops favourably during this period. The following conventions are the outcome of this movement :—(1) Concerning the preservation of wild animals, birds, and fish in Africa (1900) ; (2) concerning international hydrographic and biological investigations in the North Sea (1901) ; (3) concerning protection of birds useful for agriculture (1902) ; (4) concerning the production of sugar (1902) ; (5) concerning the White Slave traffic (1904) ; (6) concerning the establishment of an International Agricultural Institute at Rome (1905) ; (7) concerning unification of the Pharmacopœial Formulas (1906) ; (8) concerning the prohibition of the use of white phosphorus (1906) ; (9) concerning the prohibition of night work for women (1906) ; (10) concerning the international circulation of motor vehicles (1909).

It is, lastly, of the greatest importance to mention that the so-called peace movement,¹ which aims at the settlement of all international disputes by arbitration or judicial decision of an International Court, gains considerable influence over the Governments and public opinion everywhere since the first Hague Peace Conference. A great number of arbitration treaties are agreed upon, and the Permanent Court of Arbitration established at the Hague gives its first award² in a case in 1902 and its ninth in 1911. The influence of these decisions upon the peaceful settlement of international differences generally is enormous, and it may confidently be expected that the third Hague Peace Conference will make arbitration obligatory for some of the matters which do not concern the vital interests, the honour, and the independence of the States. It is a hopeful sign that, whereas most of the existing arbitra-

¹ See Fried, "Handbuch der Friedens-bewegung," 2nd ed., 2 vols. (1911).

² See below, § 476.

tion treaties exempt conflicts which concern the vital interests, the honour, and the independence, Argentina and Chili in 1902, Denmark and Holland in 1903, Denmark and Italy in 1905, Denmark and Portugal in 1907, Argentina and Italy in 1907, the Central American Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador in 1907, Italy and Holland in 1907, entered into general arbitration treaties according to which all differences, without any exception, shall be settled by arbitration.¹

Six Lessons of the History of the Law of Nations.

§ 51. It is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past. Six morals can be said to be deduced from the history of the development of the Law of Nations :

(1) The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. The history of the times of Louis XIV. and Napoleon I. shows clearly the soundness of this principle.²

(2) The second moral is that International Law can develop progressively only when international politics,

¹ The general arbitration treaties concluded in August 1911 by the United States with Great Britain and France have not yet been ratified, as the consent of the American Senate is previously required.

² Attention ought to be drawn to the fact that, although the necessity of a balance of power is generally recognised, there are some

writers of great authority who vigorously oppose this principle, as, for instance, Bulmerincq, "Praxis, Theorie und Codification des Völkerrechts" (1874), pp. 40-50. On the principle itself see Donnadien, "Essai sur la Théorie de l'Équilibre" (1900), and Dupuis, "Le Principe d'Équilibre et de Concert Européen" (1909).

especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy. It is neither to be feared, nor to be hoped, that they should occur again in the future. But if they did, they would hamper the development of the Law of Nations in the future as they have done in the past.

(3) The third moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals and can build up a national civilisation, they will certainly get that State sooner or later. What international politics can, and should, do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority. States embracing a population of several nationalities can exist and will always exist, as many examples show.

(4) The fourth moral is that every progress in the development of International Law wants due time to ripen. Although one must hope that the time will come when war will entirely disappear, there is no possibility of seeing this hope realised in our time. The first necessities of an eternal peace are that the surface of the earth should be shared between States of the same standard of civilisation, and that the moral ideas of the governing classes in all the States of the world should undergo such an alteration and progressive development as would create the conviction that arbitral awards and decisions of courts of justice are alone adequate means for the settlement of international differences. Eternal peace is an ideal, and in the very term "ideal" is involved the conviction of the impossibility of its realisation in the present, although

it is a duty to aim constantly at such realisation. The Permanent Court of Arbitration at the Hague, now established by the Hague Peace Conference of 1899, is an institution that can bring us nearer to such realisation than ever could have been hoped. And codification of parts of the Law of Nations, following the codification of the rules regarding land warfare and the codification comprised in the Declaration of London, will in due time arrive, and will make the legal basis of international intercourse firmer, broader, and more manifest than before.¹

(5) The fifth moral is that the progress of International Law depends to a great extent upon whether the legal school of International Jurists prevails over the diplomatic school.² The legal school desires International Law to develop more or less on the lines of Municipal Law, aiming at the codification of firm, decisive, and unequivocal rules of International Law, and working for the establishment of international Courts for the purpose of the administration of international justice. The diplomatic school, on the other hand, considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules. The diplomatic school opposes the establishment of international Courts because it considers diplomatic settlement of international disputes, and failing this arbitration, preferable to international administration of justice by international Courts composed of permanently appointed judges. There is, however, no doubt that international Courts are urgently needed, and that the rules of International Law require now such an authoritative interpretation and administration as only an international Court can supply.

¹ See Oppenheim, "Die Zukunft des Völkerrechts" (1911) where some progressive steps are discussed which the future may realise.

² I name these schools "diplomatic" and "legal" for want of

better denomination. They must, however, not be confounded with the three schools of the "Naturalists," "Positivists," and "Grotians," details concerning which will be given below, §§ 55-57.

(6) The sixth, and last, moral is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. The higher the standard of public morality rises, the more will International Law progress. And the more important international economic interests grow, the more International Law will grow. For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests. This being an indisputable fact, it may, therefore, fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.

III

THE SCIENCE OF THE LAW OF NATIONS

Phillimore, I., Preface to the first edition—Lawrence, §§ 31–36—Manning, pp. 21–65—Halleck, I. pp. 12, 15, 18, 22, 25, 29, 34, 42—Walker, History, I. pp. 203–337, and “The Science of International Law” (1893), *passim*—Taylor, §§ 37–48—Wheaton, §§ 4–13—Rivier in Holtzendorff, I. pp. 337–475—Nys, I. pp. 213–328—Martens, I. §§ 34–38—Fiore, I. Nos. 53–88, 164–185, 240–272—Calvo, I. pp. 27–34, 44–46, 51–55, 61–63, 70–73, 101–137—Bonfils, Nos. 147–153—Despagnet, Nos. 28–35—Ullmann, § 18—Kaltenborn, “Die Vorläufer des Hugo Grotius” (1848)—Holland, Studies, pp. 1–58, 168–175—Westlake, Chapters, pp. 23–77—Ward, “Enquiry into the Foundation and History of the Law of Nations,” 2 vols. (1795)—Nys, “Le droit de la guerre et les précurseurs de Grotius” (1882), “Notes pour servir à l’histoire . . . du droit international en Angleterre” (1888), “Les origines du droit international” (1894)—Wheaton, “Histoire des progrès du droit des gens en Europe” (1841)—Oppenheim in A.J. I. (1908), pp. 313–356—Pollock in the Cambridge Modern History, vol. XII. (1910), pp. 703–729—See also the bibliographies enumerated below in § 61.

§ 52. The science of the modern Law of Nations commences from Grotius’s work, “De Jure Belli ac Pacis libri III.,” because in it a fairly complete system

Fore-
runners of
Grotius.

of International Law was for the first time built up as an independent branch of the science of law. But there were many writers before Grotius who wrote on special parts of the Law of Nations. They are therefore commonly called "Forerunners of Grotius." The most important of these forerunners are the following: (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book "De bello, de represaliis, et de duello," which was, however, not printed before 1477; (2) Belli, an Italian jurist and statesman, who published in 1563 his book, "De re militari et de bello"; (3) Brunus, a German jurist, who published in 1548 his book, "De legationibus"; (4) Victoria, Professor in the University of Salamanca, who published in 1557 his "Relectiones theologicae,"¹ which partly deals with the Law of War; (5) Ayala, of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, "De jure et officiis bellicis et disciplina militari"; (6) Suarez, a Spanish Jesuit and Professor at Coimbra, who published in 1612 his "Tractatus de legibus et de legislatore," in which (II. c. 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States; (7) Gentilis (1552-1608), an Italian jurist, who became Professor of Civil Law in Oxford. He published in 1585 his work, "De legationibus," in 1588 and 1589 his "Commentationes de jure belli," and in 1598 an enlarged work on the same matter under the title "De jure belli libri tres."² His "Advocatio Hispanica" was edited, after his death, in 1613 by his brother Scipio. Gentilis's book "De jure belli" sup-

¹ See details in Holland, *Studies*, pp. 51-52.

² Re-edited in 1877 by Professor Holland. On Gentilis, see Holland, *Studies*, pp. 1-391; Westlake, *Chapters*, pp. 33-36; Walker, *History*, I. pp. 249-277; Thamm,

"Albericus Gentilis und seine Bedeutung für das Völkerrecht" (1896); Phillipson in *The Journal of the Society of Comparative Legislation*, New Series, XII. (1912), pp. 52-80; Balch in A.J. V. (1911), pp. 665-679.

plies, as Professor Holland shows, the model and the framework of the first and third book of Grotius's "De Jure Belli ac Pacis." "The first step"—Holland rightly says—"towards making International Law what it is was taken, not by Grotius, but by Gentilis."

§ 53. Although Grotius owes much to Gentilis, he is nevertheless the greater of the two and bears by right the title of "Father of the Law of Nations." Hugo Grotius was born at Delft in Holland in 1583. He was from his earliest childhood known as a "wondrous child" on account of his marvellous intellectual gifts and talents. He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France. He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist. He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels which led to his arrest in 1618 and condemnation to prison for life. In 1621, however, he succeeded in escaping from prison and went to live for ten years in France. In 1634 he entered into the service of Sweden and became Swedish Minister in Paris. He died in 1645 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation.

Even before he had the intention of writing a book on the Law of Nations Grotius took an interest in matters international. For in 1609, when only twenty-four years old, he published—anonynously at first—a short treatise under the title "Mare liberum," in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent.¹ But it was not until fourteen years

¹ See details with regard to the controversy concerning the freedom of the open sea below, §§ 248-250. Grotius's treatise "Mare liberum" is—as we know now—the

twelfth chapter of the work "De jure praedae," written in 1604 but never published by Grotius; it was not printed till 1868. See below, § 250.

later that Grotius began, during his exile in France, to write his "*De Jure Belli ac Pacis libri III.*," which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters. The whole development of the modern Law of Nations itself, as well as that of the science of the Law of Nations, takes root from this for ever famous book. Grotius's intention was originally to write a treatise on the Law of War, since the cruelties and lawlessness of warfare of his time incited him to the work. But thorough investigation into the matter led him further, and thus he produced a system of the Law of Nature and Nations. In the introduction he speaks of many of the authors before him, and he especially quotes Ayala and Gentilis. Yet, although he recognises their influence upon his work, he is nevertheless aware that his system is fundamentally different from those of his forerunners. There was in truth nothing original in Grotius's start from the Law of Nature for the purpose of deducing therefrom rules of a Law of Nations. Other writers before his time, and in especial Gentilis, had founded their works upon it. But nobody before him had done it in such a masterly way and with such a felicitous hand. And it is on this account that Grotius bears not only, as already mentioned, the title of "Father of the Law of Nations," but also that of "Father of the Law of Nature."

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States. Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State,

there was in existence another law which had its roots in human reason and which could therefore be discovered without any knowledge of positive law. This law of reason was called Law of Nature or Natural Law. But the system of the Law of Nature which Grotius built up and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared to posterity as the Father of the Law of Nature as well as that of the Law of Nations.

Whatever we may nowadays think of this Law of Nature, the fact remains unshaken that for more than two hundred years after Grotius jurists, philosophers, and theologians firmly believed in it. And there is no doubt that, but for the systems of the Law of Nature and the doctrines of its prophets, the modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in especial owes its very existence¹ to the theory of the Law of Nature. (Grotius did not deny that there existed in his time already a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature. He distinguishes, therefore, between the *natural* Law of Nations on the one hand, and, on the other hand, the *customary* Law of Nations, which he calls the *voluntary* Law of Nations.) The bulk of Grotius's interest is concentrated upon the natural Law of Nations, since he considered the voluntary of minor importance. But nevertheless he does not quite neglect the voluntary

¹ See Pollock in *The Journal of the Society of Comparative Legislation*, New Series, III. (1901), p. 206.

Law of Nations. Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters.

Grotius's influence was soon enormous and reached over the whole of Europe. His book¹ went through more than forty-five editions, and many translations have been published.

Zouche.

§ 54. But the modern Law of Nations has another, though minor, founder besides Grotius, and this is an Englishman, Richard Zouche² (1590–1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. A prolific writer, the book through which he acquired the title of “Second founder of the Law of Nations,” appeared in 1650 and bears the title: “*Juris et judicii fecialis, sive juris inter gentes, et quaestionum de eodem explicatio, qua, quae ad pacem et bellum inter diversos principes aut populos spectant, ex praecipuis historico jure peritis exhibentur.*” This little book has rightly been called the first manual of the *positive* Law of Nations. (The standpoint of Zouche is totally different from that of Grotius in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations.) It must be specially mentioned that Zouche is the first who used the term *jus inter gentes* for that new branch of law. Grotius knew very well and says that the Law of Nations is a law *between* the States, but he called it *jus gentium*, and it is due to his influence that until Bentham nobody called the Law of Nations *International Law*.

The distinction between the natural Law of Nations,

¹ See Rivier in Holtzendorff, I. p. 412. The last English translation is that of 1854 by William Whewell.

² See Phillipson in *The Journal*

of the Society of Comparative Legislation, New Series, IX. (1908), pp. 281–304.

chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,¹ gave rise in the seventeenth and eighteenth centuries to three different schools ² of writers on the Law of Nations—namely, the “Naturalists,” the “Positivists,” and the “Grotians.”

§ 55. “Naturalists,” or “Deniers of the Law of Nations,” is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature. The leader of the Naturalists is Samuel Pufendorf (1632–1694), who occupied the first chair which was founded for the Law of Nature and Nations at a University—namely, that at Heidelberg. Among the many books written by Pufendorf, three are of importance for the science of International Law:—(1) “*Elementa jurisprudentiae universalis*,” 1666; (2) “*De jure naturae et gentium*,” 1672; (3) “*De officio hominis et civis juxta legem naturalem*,” 1673. Starting from the assertion of Hobbes, “*De Cive*,” XIV. 4, that Natural Law is to be divided into Natural Law of individuals and of States, and that the latter is the Law of Nations, Pufendorf³ adds that outside this Natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis proprie dictae vim habeat, quae gentes tamquam a superiore profecta stringat*).

The Naturalists.

¹ It should be mentioned that already before Zouche, another Englishman, John Selden, in his “*De jure naturali et gentium secundum disciplinam ebraeorum*” (1640), recognised the importance of the positive Law of Nations. The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625–1684) ought also to be mentioned. His opinions concerning questions of maritime law, and in

especial prize law, were of the greatest importance for the development of maritime international law. See Wynne, “*Life of Sir Leoline Jenkins*,” 2 vols. (1740).

² These three schools of writers must not be confounded with the division of the present international jurists into the diplomatic and legal schools; see above, § 51, No. 5.

³ *De jure naturae et gentium*, II. c. 3, § 22.

The most celebrated follower of Pufendorf is the German philosopher, Christian Thomasius (1655–1728), who published in 1688 his “*Institutiones jurisprudentiae divinae*,” and in 1705 his “*Fundamenta juris naturae et gentium*.” Of English Naturalists may be mentioned Francis Hutcheson (“*System of Moral Philosophy*,” 1755) and Thomas Rutherford (“*Institutes of Natural Law ; being the Substance of a Course of Lectures on Grotius read in St. John’s College, Cambridge*,” 2 vols. 1754–1756). Jean Barbeyrac (1674–1744), the learned French translator and commentator of the works of Grotius, Pufendorf, and others, and, further, Jean Jacques Burlamaqui (1694–1748), a native of Geneva, who wrote the “*Principes du droit de la nature et des gens*,” ought likewise to be mentioned.

The Posi-
tivists.

§ 56. The “*Positivists*” are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The positive writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century.

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned. Rachel published in 1676 his two dissertations, “*De jure naturae et gentium*,” in which he defines the Law of Nations as the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States (*Jus plurium liberalium gentium pacto sive placito expressim aut tacite initum, quo utili-*

tatis gratia sibi in vicem obligantur). Textor published in 1680 his "Synopsis juris gentium."

In the eighteenth century the leading Positivists, Bynkershoek, Moser, and Martens, gained an enormous influence.

Cornelius van Bynkershoek¹ (1673–1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different parts of this Law. He published in 1702 "De dominio maris," in 1721 "De foro legatorum," in 1737 "Quaestionum juris publici libri II." According to Bynkershoek the basis of the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties.

Johann Jakob Moser (1701–1785), a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned: (1) "Grundsätze des jetzt üblichen Völkerrechts in Friedenszeiten," 1750; (2) "Grundsätze des jetzt üblichen Völkerrechts in Kriegszeiten," 1752; (3) "Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten," 1777–1780. Moser's books are magazines of an enormous number of facts which are of the greatest value for the positive Law of Nations. Moser never fights against the Naturalists, but he is totally indifferent towards the natural Law of Nations, since (to him the Law of Nations is positive law only and based on international custom and treaties.)

Georg Friedrich von Martens (1756–1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations. The most important is his "Précis du droit des gens moderne de l'Europe," published in 1789, of which William

¹ See Phillipson in *The Journal of the Society of Comparative Legislation*, New Series, IX. (1908), pp. 27–49.

Cobbett published in 1795 at Philadelphia an English translation, and of which as late as 1864 appeared a new edition at Paris with notes by Charles Vergé. Martens began the celebrated collection of treaties which goes under the title "*Martens, Recueil des Traités*," and is continued to our days.¹ The influence of Martens was great, and even at the present time is considerable. He is not an exclusive Positivist, since he does not deny the existence of natural Law of Nations, and since he sometimes refers to the latter in case he finds a gap in the positive Law of Nations. But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties.

The
Grotians.

§ 57. The "Grotians" stand midway between the Naturalists and the Positivists. They keep up the distinction of Grotius between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike. Grotius's influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel.

Christian Wolff (1679–1754), a German philosopher who was first Professor of Mathematics and Philosophy in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age when, in 1749, he published his "*Jus gentium methodo scientifica pertractatum*." In 1750 followed his "*Institutiones juris naturae et gentium*." Wolff's conception of the Law of Nations is influenced by his conception

¹ Georg Friedrich von Martens is not to be confounded with his nephew Charles de Martens, the author of the "*Causes célèbres de droit des gens*" and of the "*Guide diplomatique*."

of the *Civitas gentium maxima*. The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States forms a world-State above the component member States, the so-called *civitas gentium maxima*. He distinguishes four different kinds of Law of Nations—namely, the natural, the voluntary, the customary, and that which is expressly created by treaties. The latter two kinds are alterable, and have force only between those single States between which custom and treaties have created them. But the natural and the voluntary Law of Nations are both eternal, unchangeable, and universally binding upon all the States. In contradistinction to Grotius, who calls the customary Law of Nations “voluntary,” Wolff names “voluntary” those rules of the Law of Nations which are, according to his opinion, tacitly imposed by the *civitas gentium maxima*, the world-State, upon the member States.

Emerich de Vattel¹ (1714–1767), a Swiss from Neuchâtel, who entered into the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff’s teachings concerning the Law of Nations into the courts of Europe and to the diplomatists. He published in 1758 his book, “Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains.” But it must be specially mentioned that Vattel expressly rejects Wolff’s conception of the *civitas gentium maxima* in the preface to his book. Numerous editions of Vattel’s book have appeared, and as late as 1863 Pradier-Fodéré re-edited it at Paris. An English translation by Chitty appeared in 1834 and went through several editions. His influence was very great, and in diplo-

¹ See Montmorency in *The Journal of the Society of Comparative Legislation*, New Series, X. (1909), pp. 17–39.

matic circles his book still enjoys an unshaken authority.

Treatises
of the
Nine-
teenth and
Twentieth
Centuries.

§ 58. Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary, because these schools are still in existence. I do not, however, intend to give a list of writers on special subjects, and the following list of treatises comprises the more important ones only.

(1) BRITISH TREATISES

William Oke Manning : Commentaries on the Law of Nations, 1839 ; new ed. by Sheldon Amos, 1875.

Archer Polson : Principles of the Law of Nations, 1848 ; 2nd ed. 1853.

Richard Wildman : Institutes of International Law, 2 vols. 1849–1850.

✓ *Sir Robert Phillimore* : Commentaries upon International Law, 4 vols. 1854–1861 ; 3rd ed. 1879–1888.

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Sheldon Amos : Lectures on International Law, 1874.

Sir Edward Shepherd Creasy : First Platform of International Law, 1876.

✓ *William Edward Hall* : Treatise on International Law, 1880 ; 6th ed. 1909 (by Atlay).

Sir Henry Sumner Maine : International Law, 1883 ; 2nd ed. 1894 (Whewell Lectures, not a treatise).

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Leone Levi : International Law, 1888.

✓ *T. J. Lawrence* : The Principles of International Law, 1895 ; 4th ed. 1910.

✓ *Thomas Alfred Walker* : A Manual of Public International Law, 1895.

Sir Sherston Baker : First Steps in International Law, 1899.

F. E. Smith : International Law, 1900 ; 4th ed. 1911 (by Wylie).

✓ *John Westlake* : International Law, vol. I. (Peace) 1904, vol. II. (War) 1907 ; 2nd ed. vol. I. 1910.

(2) NORTH AMERICAN TREATISES

- James Kent* : Commentary on International Law, 1826 ; English edition by Abdy, Cambridge, 1888.
- Henry Wheaton* : Elements of International Law, 1836 ; 8th ✓ American ed. by Dana, 1866 ; 3rd English ed. by Boyd, 1889 ; 4th English ed. by Atlay, 1904.
- Theodore D. Woolsey* : Introduction to the Study of International ✓ Law, 1860 ; 6th ed. by Th. S. Woolsey, 1891.
- Henry W. Halleck* : International Law, 2 vols. 1861 ; 4th English ed. by Sir Sherston Baker, 1907.
- ✓ *Francis Wharton* : A Digest of the International Law of the United States, 3 vols. 1886.
- George B. Davis* : The Elements of International Law, 1887 ; 3rd ed. 1908.
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- ✓ *John Basset Moore* : A Digest of International Law, 8 vols. 1906.
- George Grafton Wilson* : Handbook of International Law, 1910.

(3) FRENCH TREATISES

- Funck-Brentano et Albert Sorel* : Précis du Droit des Gens, 1877 ; 2nd ed. 1894.
- P. Pradier-Fodéré* : Traité de Droit International Public, 8 vols. 1885-1906.
- Henry Bonfils* : Manuel de Droit International Public, 1894 ; 5th ed. by Fauchille, 1908.
- Georges Bry* : Précis élémentaire de Droit International Public ; 5th ed. 1906.
- Frantz Despagnet* : Cours de Droit International Public, 1894 ; 4th ed. by De Boeck, 1910.
- Robert Piédelièvre* : Précis de Droit International Public, 2 vols. 1894-1895.
- A. Mérignhac* : Traité de Droit Public International, vol. I. 1905 ; vol. II. 1907.

(4) GERMAN TREATISES

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✓ *Heinrich Bernhard Oppenheim*: System des Völkerrechts, 1845; 2nd ed. 1866.

✓ *Johann Caspar Bluntschli*: Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1868; 3rd ed. 1878; French translation by Lardy, 5th ed. 1895.

Adolf Hartmann: Institutionen des praktischen Völkerrechts in Friedenszeiten, 1874; 2nd ed. 1878.

Franz von Holtzendorff: Handbuch des Völkerrechts, 4 vols. 1885–1889. Holtzendorff is the editor and a contributor, but there are many other contributors.

August von Bulmerincq: Das Völkerrecht, 1887.

Karl Gareis: Institutionen des Völkerrechts, 1888; 2nd. ed. 1901.

E. Ullmann: Völkerrecht, 1898; 2nd ed. 1908.

✓ *Franz von Liszt*: Das Völkerrecht, 1898; 6th ed. 1910.

(5) ITALIAN TREATISES

✓ *Luigi Casanova*: Lezioni di diritto internazionale, published after the death of the author by Cabella, 1853; 3rd. ed. by Brusa, 1876.

✓ *Pasquale Fiore*: Trattato di diritto internazionale pubblico, 1865; 4th ed. in 3 vols. 1904; French translation of the 2nd ed. by Antoine, 1885.

Giuseppe Carnazza-Amari: Trattato di diritto internazionale di pace, 2 vols. 1867–1875; French translation by Montanari-Pevest, 1881.

✓ *Antonio del Bon*: Institutioni del diritto pubblico internazionale, 1868.

Giuseppe Sandona: Trattato di diritto internazionale moderno, 2 vols. 1870.

Gian Battista Pertille: Elementi di diritto internazionale, 2 vols. 1877.

Augusto Pierantoni: Trattato di diritto internazionale, vol. I. 1881. (No further volume has appeared.)

Giovanni Lomonaco: Trattato di diritto internazionale pubblico, 1905.

Giulio Diena: Principi di diritto internazionale, Parte Prima, Diritto internaziiole pubblico, 1908.

(6) SPANISH AND SPANISH-AMERICAN TREATISES

Andrés Bello : Principios de derecho de gentes (internacional), 1832 ; last ed. in 2 vols. by Silva, 1883.

José Maria de Pando : Elementos del derecho internacional, published after the death of the author, 1843–1844.

Antonio Riquelme : Elementos de derecho público internacional, etc. ; 2 vols. 1849.

Carlos Calvo : Le Droit International, etc. (first edition in ✓ Spanish, following editions in French), 1868 ; 5th ed. in 6 vols. 1896.

Amancio Alcorta : Curso de derecho internacional público, vol. I. 1886 ; French translation by Lehr, 1887.

Marquis de Olivart : Trattato y notas de derecho internacional público, 4 vols. 1887 ; 4th ed. 1903–1904.

Luis Gestoso y Acosta : Curso de derecho internacional público, 1894.

Miguel Cruchaga : Nociones de derecho internacional, 1899 ; 2nd ed. 1902.

Manuel Torres Campos : Elementos de derecho internacional público ; 2nd. ed. 1904.

(7) TREATISES OF AUTHORS OF OTHER NATIONALITIES

Frederick Kristian Bornemann : Forelæsninger over den positive Folkeret, 1866.

✓ *Friedrich von Martens* : Völkerrecht, 2 vols. 1883 ; a German translation by Berghohm of the Russian original. A French translation by Léo in 3 vols. appeared in the same year. The Russian original went through its 5th ed. in 1905.

Jan Helenus Ferguson : Manual of International Law, etc., 2 vols. 1884. The author is Dutch, but the work is written in English.

✓ *Alphonse Rivier* : Lehrbuch des Völkerrechts, 1894 ; 2nd ed. 1899, and the larger work in two vols. under the title : Principes du Droit des Gens, 1896. The author of these two excellent books was a Swiss who taught International Law at the University of Brussels.

H. Matzen : Forelæsninger over den positive Folkeret, 1900.

✓ *Ernest Nys* : Le droit international, 3 vols. 1904–1906. The author of this exhaustive treatise is a Belgian jurist whose researches in the history of the science of the Law of Nations have gained him far-reaching reputation.¹

J. De Louter : Het Stellig Volkenrecht, 2 vols. 1910.

¹ The first volume of Nys contains in its pp. 251–328 an exhaustive enumeration of all the more important works on International Law, treatises

as well as monographs, and I have much pleasure in referring my readers to this learned work.

The
Science of
the Law
of Nations
in the
Nine-
teenth and
Twentieth
Centuries
as repre-
sented by
treatises.

§ 59. The Science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor is the endeavour, on the whole sincere, of the Powers since the Congress of Vienna to submit to the rules of the Law of Nations. The second factor is the many law-making treaties which arose during this century. And the last, but not indeed the least factor, is the downfall of the theory of the Law of Nature, which after many hundreds of years has at last been shaken off during the second half of this century.

When the nineteenth century opens, the three schools of the Naturalists, the Positivists, and the Grotians are still in the field, but Positivism¹ gains slowly and gradually the upper hand, until at the end it may be said to be victorious, without, however, being omnipotent. The most important writer² up to 1836 is Klüber, who may be called a Positivist in the same sense as Martens, for he also applies the natural Law of Nations to fill up the gaps of the positive. Wheaton appears in 1836 with his "Elements," and, although an American, at once attracts the attention of the whole of Europe. He may be called a Grotian. And the same may be maintained of Manning, whose treatise appeared in 1839, and is the first that attempts a survey of British practice regarding sea warfare based on the judgments of Sir William Scott (Lord Stowell). Heffter, whose book appeared in 1844, is certainly a Positivist, although he does not absolutely deny the Law of Nature. In exact application of the juristic method, Heffter's book excels all former ones, and all the following authors

¹ Austin and his followers who hold that the rules of International Law are rules of "positive morality" must be considered Positivists, although they do not agree to International Law being real law.

² I do not intend to discuss the merits of writers on special subjects, and I mention only the authors of the most important treatises which are written in, or translated into, English, French, or German.

are in a sense standing on his shoulders. In Phillimore, Great Britain sends in 1854 a powerful author into the arena, who may, on the whole, be called a Positivist of the same kind as Martens and Klüber. Generations to come will consult Phillimore's volumes on account of the vast amount of material they contain and the sound judgment they exhibit. And the same is valid with regard to Sir Travers Twiss, whose first volume appeared in 1861. Halleck's work, which appeared in the same year, is of special importance as regards war, because the author, who was a General in the service of the United States, gave to this part his special attention. The next prominent author, the Italian Fiore, who published his system in 1865 and may be called a Grotian, is certainly the most prominent Italian author, and the new edition of his work will for a long time to come be consulted. Bluntschli, the celebrated Swiss-German author, published his book in 1867; it must, in spite of the world-wide fame of its author, be consulted with caution, because it contains many rules which are not yet recognised rules of the Law of Nations. Calvo's work, which first appeared in 1868, contains an invaluable store of facts and opinions, but its juristic basis is not very exact.

From the seventies of the nineteenth century the influence of the downfall of the theory of the Law of Nature becomes visible in the treatises on the Law of Nations, and therefore real positivistic treatises make their appearance. For the Positivism of Zouche, Bynkershoek, Martens, Klüber, Heffter, Phillimore, and Twiss was no real Positivism, since these authors recognised a natural Law of Nations, although they did not make much use of it. Real Positivism must entirely avoid a natural Law of Nations. We know nowadays that a Law of Nature does not exist. Just as the so-called Natural Philosophy had to give way to real

natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of the positive law. Only a positive Law of Nations can be a branch of the science of law.

The first real positive treatise known to me is Hartmann's "Institutionen des praktischen Völkerrechts in Friedenszeiten," which appeared in 1874, but is hardly known outside Germany. In 1880 Hall's treatise appeared, and at once won the attention of the whole world; it is one of the best books on the Law of Nations that have ever been written. Lorimer, whose two volumes appeared in 1883 and 1884, is a Naturalist pure and simple, but his work is nevertheless of value. The Russian Martens, whose two volumes appeared in German and French translations in 1883 and at once put their author in the forefront of the authorities, certainly intends to be a real Positivist, but traces of Natural Law are nevertheless now and then to be found in his book. A work of a special kind is that of Holtzendorff, the first volume of which appeared in 1885. Holtzendorff himself is the editor and at the same time a contributor to the work, but there are many other contributors, each of them dealing exhaustively with a different part of the Law of Nations. The copious work of Pradier-Fodéré, which also began to appear in 1885, is far from being positive, although it has its merits. Wharton's three volumes, which appeared in 1886, are not a treatise, but contain the international practice of the United States. Bulmerincq's book, which appeared in 1887, gives a good survey of International Law from the positive point of view. In 1894 three French jurists, Bonfils, Despagnet, and Piédelièvre, step into the arena; their treatises are comprehensive and valuable, but not absolutely positive. On the other hand, the English authors Lawrence and Walker, whose excellent manuals

appeared in 1895, are real Positivists. Of the greatest value are the two volumes of Rivier which appeared in 1896; they are full of sound judgment, and will influence the theory and practice of International Law for a long time to come. Liszt's short manual, which in its first edition made its appearance in 1898, is positive throughout, well written, and suggestive. Ullmann's work, which likewise appeared in its first edition in 1898, is an excellent and comprehensive treatise which thoroughly discusses all the more important problems and points from the positive standpoint. Hannis Taylor's comprehensive treatise, which appeared in 1901, is likewise thoroughly positive, and so are the serviceable manuals of Wilson and Maxey. Of great value are the two volumes of Westlake which appeared in 1904 and 1907; they represent rather a collection of thorough monographs than a treatise, and will have great and lasting influence. A work of particular importance is the "Digest" of John Basset Moore, which appeared in 1906, comprises eight volumes, and contains the international practice of the United States in a much more exhaustive form than the work of Wharton; it is an invaluable work which must be consulted on every subject. The same is valid with regard to the three volumes of Nys, who may be characterised as a Grotian, and whose work is full of information on the historical and literary side of the problems.¹

¹ On the task and method of the science of International Law from

the positive standpoint, see Oppenheim in A.J. II. (1908), pp. 313-356.

§ 60. COLLECTIONS OF TREATIES

(1) GENERAL COLLECTIONS

- ✓ *Leibnitz* : Codex iuris gentium diplomaticus (1693) ; Mantissa codicis iuris gentium diplomatici (1700).
- ✓ *Bernard* : Recueil des traités, etc. 4 vols. (1700).
- Rymer* : Foedera etc. inter reges angliae et alios quosvis imperatores . . . ab anno 1101 ad nostra usque tempora habita et tradata, 20 vols. 1704–1718 (Contains documents from 1101–1654).
- ✓ *Dumont* : Corps universel diplomatique, etc., 8 vols. (1726–1731).
- Rousset* : Supplément au corps universel diplomatique de Dumont, 5 vols. (1739).
- Schmauss* : Corpus iuris gentium academicum (1730).
- Wenck* : Codex iuris gentium recentissimi, 3 vols. (1781, 1786, 1795).
- ✓ *Martens* : Recueil de Traités d'Alliance, etc., 8 vols. (1791–1808) ; Nouveau Recueil de Traités d'Alliance, etc., 16 vols. (1817–1842) ; Nouveaux Suppléments au Recueil de Traités et d'autres Actes remarquables, etc., 3 vols. (1839–1842) ; Nouveau Recueil Général de Traités, Conventions et autres Actes remarquables, etc., 20 vols. (1843–1875) ; Nouveau Recueil Général de Traités et autres Actes relatifs aux Rapports de droit international ; Deuxième Série, 35 vols. (1876–1908) ; Nouveau Recueil Général de Traités et autres Actes relatifs aux Rapports de droit international, Troisième Série, vol. I. 1908, continued up to date. Present editor, Heinrich Triepel, professor in the University of Kiel in Germany.
- ✓ *Ghillany* : Diplomatisches Handbuch, 3 vols. (1855–1868).
- ✓ *Martens et Cussy* : Recueil manuel, etc., 7 vols. (1846–1857) ; continuation by Geffcken, 3 vols. (1857–1885).
- ✓ *British and Foreign State Papers* : Vol. I. 1814, continued up to date, one volume yearly.
- Das Staatsarchiv* : Sammlung der officiellen Actenstücke zur Geschichte der Gegenwart, vol. I. 1861, continued up to date, one volume yearly.
- ✓ *Archives diplomatiques* : Recueil mensuel de diplomatie, d'histoire, et de droit international, first and second series, 1861–1900, third series from 1901 continued up to date (4 vols. yearly).
- ✓ *Recueil International des Traités du XX^e Siècle* : Edited by Descamps and Renault since 1901.
- Strupp* : Urkunden zur Geschichte des Völkerrechts, 2 vols. (1911).

(2) COLLECTIONS OF ENGLISH TREATIES ONLY

Jenkinson : Collection of all the Treaties, etc., between Great Britain and other Powers from 1648 to 1783, 3 vols. (1785).

Chalmers : A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols. (1790).

Hertslet : Collection of Treaties and Conventions between Great Britain and other Powers (vol. I. 1820, continued to date).

Treaty Series : Vol. I. 1892, and a volume every year.

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Kamptz : Neue Litteratur des Völkerrechts seit 1784 (1817).

Klüber : Droit des gens moderne de l'Europe (Appendix) (1819).

Miruss : Das Europäische Gesandtschafterecht, vol. II. (1847).

Mohl : Geschichte und Litteratur des Staatswissenschaften, vol. I. pp. 337–475 (1855).

Woolsey : Introduction to the Study of International Law (6th ed. 1891), Appendix I.

Rivier : pp. 393–523 of vol. I. of Holtzendorff's Handbuch des Völkerrechts (1885).

Stoerk : Die Litteratur des internationalen Rechts von 1884–1894 (1896).

Olivart : Catalogue d'une bibliothèque de droit international (1899).

Nys : Le droit international, vol. I. (1904), pp. 213–328.

§ 62. PERIODICALS

Revue de droit international et de législation comparée. It has appeared in Brussels since 1869, one volume yearly. Present editor, Edouard Rolin.

Revue générale de droit international public. It has appeared in Paris since 1894, one volume yearly. Founder and present editor, Paul Fauchille.

Zeitschrift für internationales Recht. It has appeared in Leipzig since 1891, one volume yearly. Present editor, Theodor Niemeyer.

✓ *Annuaire de l'Institut de Droit International*, vol. I. 1877. A volume appears after each meeting of the Institute.

✓ *Kokusaiho-Zasshi*, the Japanese International Law Review. It has appeared in Tokio since 1903.

Revista de Derecho Internacional y politica exterior. It has appeared in Madrid since 1905, one volume yearly. Editor, Marquis de Olivart.

Rivista di Diritto Internazionale. It has appeared in Rome since 1906, one volume yearly. Editors, D. Anzilotti, A. Ricci-Busatti, and L. A. Senigallia.

Zeitschrift für Völkerrecht und Bundestaatsrecht. It has appeared in Breslau since 1906, one volume yearly. Editors, Joseph Kohler, L. Oppenheim, and F. Holldack.

✓ *The American Journal of International Law*. It has appeared in Washington since 1907, one volume yearly. Editor, James Brown Scott.

Essays and Notes concerning International Law frequently appear also in the *Journal du droit international privé et de la Jurisprudence comparée* (Clunet), the *Archiv für öffentliches Recht*, *The Law Quarterly Review*, *The Law Magazine and Review*, *The Juridical Review*, *The Journal of the Society of Comparative Legislation*, *The American Law Review*, the *Annalen des deutschen Reiches*, the *Zeitschrift für das privat- und öffentliche Recht der Gegenwart* (Grünhut), the *Revue de droit public et de la science politique* (Larnaude), the *Annales des sciences politiques*, the *Archivio giuridico*, the *Jahrbuch des öffentlichen Rechts*, and many others.

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I

SOVEREIGN STATES AS INTERNATIONAL PERSONS

Vattel, I. §§ 1-12—Hall, § 1—Lawrence, § 42—Phillimore, I. §§ 61-69—Twiss, I. §§ 1-11—Taylor, § 117—Walker, § 1—Westlake, I. pp. 1-5, 20-21—Wheaton, §§ 16-21—Ullmann, § 19—Heffter, § 15—Holtzendorff in Holtzendorff, II. pp. 5-11—Bonfils, Nos. 160-164—Despagnet, Nos. 69-74—Pradier-Fodéré, I. Nos. 43-81—Nys, I. pp. 329-356—Rivier, I. § 3—Calvo, I. §§ 39-41—Fiore, I. Nos. 305-309, and Code, Nos. 51-77—Martens, I. §§ 53-54—Mérignhac, I. pp. 114-231, and II. pp. 5, 154-221—Moore, I. § 3.

§ 63. The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. Sovereign States exclusively are International Persons—i.e. subjects of International Law. There are, however, as will be seen, full and not-full Sovereign States. Full Sovereign States are perfect, not-full Sovereign States are imperfect International Persons, for not-full Sovereign States are for some parts only subjects of International Law.

Real and
apparent
International
Persons.

In contradistinction to Sovereign States which are real, there are also apparent, but not real, International Persons—namely, Confederations of States, insurgents recognised as a belligerent Power in a civil war, and the Holy See. All these are not, as will be seen,¹ real

¹ See below, § 88 (Confederations of States), § 106 (Holy See), and vol. II. §§ 59 and 76 (Insurgents).

subjects of International Law, but in some points are treated as though they were International Persons, without thereby becoming members of the Family of Nations.

It must be specially mentioned that the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, private individuals, or churches, nor to chartered companies, nations, or races after the loss of their State (as, for instance, the Jews or the Poles), and organised wandering tribes.¹

Concep-
tion of the
State.

§ 64. A State proper—in contradistinction to so-called Colonial States—is in existence when a people is settled in a country under its own Sovereign Government. The conditions which must obtain for the existence of a State are therefore four :

There must, first, be a people. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a country in which the people has settled down. A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State. But it matters not whether the country is small or large ; it may consist, as with City States, of one town only.

There must, thirdly, be a Government—that is, one or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a Sovereign

¹ Most jurists agree with this opinion, but there are some who disagree. Thus, for instance, Heffter (§ 48) claims for monarchs the character of subjects of the Law of Nations ; Lawrence (§ 42) claims that

character for corporations ; and Westlake, Chapters, p. 2, and Fiore, Code, Nos. 51, 61-64, claim it for individuals. The matter will be discussed below in §§ 288, 290, 344, 384.

Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country.

§ 65. A State in its normal appearance does possess independence all round and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full Sovereign States. All States which are under the suzerainty or under the protectorate of another State or are member States of a so-called Federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the tasks of a State, whereas with regard to another part they are under the authority of another State. Hence it is that the question is disputed whether such not-full Sovereign States can be International Persons and subjects of the Law of Nations at all.¹

Not-full
Sovereign
States.

That they cannot be full, perfect, and normal subjects of International Law there is no doubt. But it is wrong to maintain that they can have no international position whatever and can never be members of the Family of Nations at all. If we look at the matter as it really stands, we observe that they actually often enjoy in many points the rights and fulfil in other points the duties of International Persons. They often send and receive diplomatic envoys or at least consuls. They often conclude commercial or other international treaties. Their monarchs enjoy the privileges which according to the Law of Nations the Municipal Laws of the different States must grant to the monarchs of foreign States.

¹ The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not-full Sovereign States. The object of discussion here is the question whether such States can be con-

sidered as International Persons at all. Westlake, I. p. 21, answers it affirmatively by stating: "It is not necessary for a State to be independent in order to be a State of International Law."

No other explanation of these and similar facts can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly ; but the very existence of States without full sovereignty is an anomaly in itself. And history teaches that States without full sovereignty have no durability, since they either gain in time full sovereignty or disappear totally as separate States and become mere provinces of other States. So anomalous are these not-full Sovereign States that no hard-and-fast general rule can be laid down with regard to their position within the Family of Nations, since everything depends upon the special case. What may be said in general concerning all the States without full sovereignty is that their position within the Family of Nations, if any, is always more or less overshadowed by other States. But their partial character of International Persons comes clearly to light when they are compared with so-called Colonial States, such as the Dominion of Canada or the Commonwealth of Australia. Colonial States have no international position¹ whatever ; they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother-country, although they enjoy perfect self-government, and may therefore in a sense be called States. The deciding factor is that their Governor, who has a *veto*, is appointed by the mother-country, and that the Parliament of the mother-country could withdraw self-government from its Colonial States and legislate directly for them.

Divisibility of

§ 66. The distinction between States full Sovereign

¹ Therefore treaties concluded by Canada with foreign States are not Canadian treaties, but treaties concluded by Great Britain for Canada. Should Colonial States ever acquire the right to conclude treaties directly

with foreign States without the consent of the mother-country, they would become internationally part-sovereign and thereby obtain a certain international position.

and not-full Sovereign is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But many jurists deny the divisibility of sovereignty and maintain that a State is either sovereign or not. They deny that sovereignty is a characteristic of every State and of the membership of the Family of Nations. It is therefore necessary to face the conception of sovereignty more closely. And it will be seen that there exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.¹

Sovereignty
contested.

§ 67. The term Sovereignty was introduced into political science by Bodin in his celebrated work, "De la république," which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word souverain² was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called *Cours Souverains*. Bodin, however, gave quite a new meaning to the old conception. Being under the influence and in favour of the policy of centralisation initiated by Louis XI. of France (1461-1483), the founder of French absolutism, he defined sovereignty as "the absolute and perpetual power within a State." Such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature. No constitution can limit sovereignty, which is an attribute of the king

Meaning
of Sovereignty in
the Sixteenth and
Seventeenth
Centuries.

¹ The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers:—Dock, "Der Souveränitätsbegriff von Bodin bis zu Friedrich dem Grossen," 1897; Merriam, "History of the Theory of

Sovereignty since Rousseau," 1900; Rehm, "Allgemeine Staatslehre," 1899, §§ 10-16. See also Maine, "Early Institutions," pp. 342-400.

² *Souverain* is derived either from the Latin *superanus* or from *suprema potestas*.

in a monarchy and of the people in a democracy. A Sovereign is above positive law. A contract only is binding upon the Sovereign, because the Law of Nature commands that a contract shall be binding.¹

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law. Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance. On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining² that a Sovereign was not bound by anything and had a right over everything, even over religion. Whereas a good many publicists followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty includes omnipotence. According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted.³ Yet in spite of all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible and contains the centralisation of all power in the hands of the Sovereign, whether a monarch or the people itself in a republic. Yet the way for another conception of sovereignty is prepared by Locke, whose "Two Treatises on Government" appeared in 1689, and paved the way for the doctrine that the State itself is the original Sovereign, and that all supreme powers of the Government are derived from this sovereignty of the State.

Meaning
of Sovereignty

§ 68. In the eighteenth century matters changed again. The fact that the several hundred reigning

¹ See Bodin, "De la république," I. c. 8.

² See Hobbes, "De cive," c. 6, §§ 12-15.

³ See Pufendorf, "De jure naturae et gentium," VII. c. 6, §§ 1-13.

princes of the member-States of the German Empire had practically, although not theoretically, become more or less independent since the Westphalian Peace enforced the necessity upon publicists to recognise a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half-sovereignty. Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States. Relative and not-full sovereignty, or half-sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of State, more or less dependent upon other monarchs. By this distinction the divisibility of sovereignty was recognised. And when in 1787 the United States of America turned from a Confederation of States into a Federal State, the division of sovereignty between the Sovereign Federal State and the Sovereign member-States appeared. But it cannot be maintained that divisibility of sovereignty was universally recognised in the eighteenth century. It suffices to mention Rousseau, whose "Contrat Social" appeared in 1762 and defended again the indivisibility of sovereignty. Rousseau's conception of sovereignty is essentially that of Hobbes, since it contains absolute supreme power, but he differs from Hobbes in so far as, according to Rousseau, sovereignty belongs to the people only and exclusively, is inalienable, and therefore cannot be transferred from the people to any organ of the State.

in the
Eigh-
teenth
Century.

§ 69. During the nineteenth century three different factors of great practical importance have exercised their influence on the history of the conception of sovereignty.

Meaning
of Sove-
reignty in
the Nine-
teenth
Century.

The first factor is that, with the exception of Russia, all civilised Christian monarchies during this period turned into constitutional monarchies. Thus identifica-

tion of sovereignty with absolutism belongs practically to the past, and the fact was during the nineteenth century generally recognised that a sovereign monarch may well be restricted in the exercise of his powers by a Constitution and positive law.

The second factor is, that the example of a Federal State set by the United States has been followed by Switzerland, Germany, and others. The Constitution of Switzerland as well as that of Germany declares decidedly that the member-States of the Federal State remain Sovereign States, thus indirectly recognising the divisibility of sovereignty between the member-States and the Federal State according to different matters.

The third and most important factor is, that the science of politics has learned to distinguish between sovereignty of the State and sovereignty of the organ which exercises the powers of the State. The majority of publicists teach henceforth that neither the monarch, nor Parliament, nor the people is originally Sovereign in a State, but the State itself. Sovereignty, we say nowadays, is a natural attribute of every State as a State. But a State, as a Juristic Person, wants organs to exercise its powers. The organ or organs which exercise for the State powers connected with sovereignty are said to be sovereign themselves, yet it is obvious that this sovereignty of the organ is derived from the sovereignty of the State. And it is likewise obvious that the sovereignty of a State may be exercised by the combined action of several organs; as, for instance, in Great Britain, King and Parliament are the joint administrators of the sovereignty of the State. And it is, thirdly, obvious that a State can, as regards certain matters, have its sovereignty exercised by one organ and as regards other matters by another organ.

In spite of this condition of things, the old controversy regarding divisibility of sovereignty has by no

means died out. It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into Federal States, and, on the other, through the conflict between the United States of America and her Southern member-States. The theory of the concurrent sovereignty of the Federal State and its member-States, as defended by "The Federalist" (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,¹ whom numerous publicists followed. The theory of the indivisibility of sovereignty was defended by Calhoun,² and many European publicists followed him in time.

§ 70. From the foregoing sketch of the history of the conception of sovereignty it becomes apparent that there is not and never was unanimity regarding this conception. It is therefore no wonder that the endeavour has been made to eliminate the conception of sovereignty from the science of politics altogether, and likewise to eliminate sovereignty as a necessary characteristic of statehood, so that States with and without sovereignty would in consequence be distinguishable. It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.

Result of
the Con-
troversy
regarding
Sove-
reignty.

¹ Politik, 1862.

² A Disquisition on Government, 1851.

II

RECOGNITION OF STATES AS INTERNATIONAL PERSONS

Hall, §§ 2 and 26—Lawrence, §§ 44–47—Phillimore, II. §§ 10–23—Taylor, §§ 153–160—Walker, § 1—Westlake, I. pp. 49–58—Wheaton, § 27—Moore, §§ 27–75—Bluntschli, §§ 28–38—Hartmann, § 11—Heffter, § 23—Holtzendorff in Holtzendorff, II. pp. 18–33—Liszt, § 5—Ullmann, §§ 29–30—Bonfils, Nos. 195–213—Despagnet, Nos. 79–85—Pradier-Fodéré, I. Nos. 136–145—Nys, I. pp. 69–115—Mérignhao, I. pp. 320–329—Rivier, I. § 3—Calvo, I. §§ 87–98—Fiore, I. Nos. 311–320, and Code, Nos. 160–177—Martens, I. §§ 63–64—Le Normand, “*La reconnaissance internationale et ses diverses applications*” (1899).

Recognition a condition of Membership of the Family of Nations.

§ 71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not include membership of the Family of Nations. There are States in existence, although their number decreases gradually, which are not, or not fully, members of that family, because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born.¹ For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is and becomes an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person.² They do

¹ See above, §§ 27 and 28.

² See, for instance, Hall, §§ 2 and

26: Ullmann, § 29; Gareis, p. 64; Rivier, I. p. 57.

not deny that practically such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact.

If the real facts of international life are taken into consideration, this opinion cannot stand. It is a rule of International Law that no new State has a right towards other States to be recognised by them, and that no State has the duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has towards other members. It can, therefore, not be seen what the function of recognition could be if a State entered at its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.

§ 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. Recognition is given either expressly or tacitly. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. On the other hand, recognition is tacitly and indirectly given when an old State enters officially into intercourse with the new, be it by sending or receiving a diplomatic envoy,¹

Mode of
Recogni-
tion.

¹ Whether the sending of a consul includes recognition is discussed below, § 428.

or by concluding a treaty, or by any other act through which it becomes apparent that the new State is actually treated as an International Person.

But no new State has by International Law a right to demand recognition, although practically such recognition cannot in the long run be withheld, because without it there is no possibility of entering into intercourse with the new State. The interests of the old States must suffer quite as much as those of the new State, if recognition is for any length of time refused, and practically these interests in time enforce either express or tacit recognition. History nevertheless records many cases of deferred recognition,¹ and, apart from other proof, it becomes thereby apparent that the granting or the denial of recognition is not a matter of International Law but of international policy.

It must be specially mentioned that recognition by one State is not at all binding upon other States, so that they must follow suit. But in practice such an example, if set by one or more Great Powers and at a time when the new State is really established on a sound basis, will make many other States at a later period give their recognition too.

Recogni-
tion under
Condi-
tions.

§ 73. Recognition will as a rule be given without any conditions whatever, provided the new State is safely and permanently established. Since, however, the granting of recognition is a matter of policy, and not of law, nothing prevents an old State from making the recognition of a new State dependent upon the latter fulfilling certain conditions. Thus the Powers assembled at the Berlin Congress in 1878 recognised Bulgaria, Montenegro, Servia, and Roumania under the condition only that these States did not² impose any

¹ See the cases enumerated by Rivier, I. p. 58.

² This condition contains a re-

striction on the personal supremacy of the respective States. See below, § 128.

religious disabilities on any of their subjects.¹ The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the internationally legal duty upon such State of complying with the condition; failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition.

§ 74. Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution. And here the question is material whether a new State has really already safely and permanently established itself or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign State can recognise the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own, there is no doubt. But between this recognition as a belligerent Power and the recognition of these insurgents and their part of the country as a new State, there is a broad and deep gulf. And the question is precisely at what exact time recognition of a new State may be given instead of the recognition as a belligerent Power. For an untimely and precipitate recognition as a new State is a violation of the dignity² of the mother-State, to which the latter need not patiently submit.

Recogni-
tion
timely and
precipi-
tate.

In spite of the importance of the question, no hard-

¹ See arts. 5, 25, 35, and 44 of the Treaty of Berlin of 1878, in Martens, N.R.G. 2nd Ser. III. p. 449.

² It is frequently maintained that such untimely recognition contains an intervention. But this is not

correct, since intervention is (see below, § 134) *dictatorial* interference in the affairs of another State. The question of recognition of the belligerency of insurgents is exhaustively treated by Westlake, I. pp. 50-57.

and-fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently. The characteristic of such safe and permanent establishment may be found either in the fact that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary back under its sway.¹ Of course, as soon as the mother-State itself recognises the new State, there is no reason for other States to withhold any longer their recognition, although they have even then no legal obligation to grant it.

The breaking off of the American States from their European mother-States furnishes many illustrative examples. Thus the recognition of the United States by France in 1778 was precipitate. But when in 1782 England herself recognised the independence of the United States, other States could accord recognition too without giving offence to England. Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years. When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United States recognised the new States in 1822, and England followed the example in 1824 and 1825.²

State
Recogni-
tion in
contradis-
tinction to
other
Recogni-
tions.

§ 75. Recognition of a new State must not be confounded with other recognitions. Recognition of insurgents as a belligerent Power has already been mentioned. Besides this, recognition of a change in the

¹ When, in 1903, Panama fell away from Colombia, the United States immediately recognised the new Republic as an independent State. For the motives of this quick action, see Moore, I. § 344, pp. 46 and following.

² See Gibbs, "Recognition: a Chapter from the History of the North American and South American States" (1863), and Moore, I. §§ 28-36.

form of the government or of change in the title of an old State is a matter of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses the recognition of a change in the form of the government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. And if recognition of a new title¹ of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title.

III

CHANGES IN THE CONDITION OF INTERNATIONAL PERSONS

Grotius, II. c. 9, §§ 5-13—Pufendorf, VIII. c. 12—Vattel, I. § 11—Hall, § 2—Halleck, I. pp. 89-92—Phillimore, I. §§ 124-137—Taylor, § 163—Westlake, I. pp. 58-66—Wheaton, §§ 28-32—Moore, I. §§ 76-79—Bluntschli, §§ 39-53—Hartmann, §§ 12-13—Heffter, § 24—Holtzendorff in Holtzendorff, II. pp. 21-23—Liszt, § 5—Ullmann, §§ 31 and 35—Bonfils, Nos. 214-215—Despagnet, Nos. 86-89—Pradier-Fodéré, I. Nos. 146-157—Nys, I. pp. 399-401—Rivier, I. § 3—Calvo, I. §§ 81-106—Fiore, I. Nos. 321-331, and Code, Nos. 119-141—Martens, I. §§ 65-69.

§ 76. The existence of International Persons is exposed to the flow of things and times. There is a constant and gradual change in their citizens through deaths and births, emigration, and immigration. There is a frequent change in those individuals who are at the head of the States, and there is sometimes a change in the form of their governments, or in their dynasties if they are monarchies. There are sometimes changes in their territories through loss or increase of parts thereof, and there are sometimes changes regarding their independence through partial or total loss of the

Important
in contra-
distinc-
tion to
Indif-
ferent
Changes.

¹ See below, § 119.

same. Several of these and other changes in the condition and appearance of International Persons are indifferent to International Law, although they may be of great importance for the inner development of the States concerned and directly or indirectly for international policy. Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person, others do not; again, others extinguish a State as an International Person altogether.

Changes
not affect-
ing States
as Inter-
national
Persons.

§ 77. A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory. These changes cannot be said to be indifferent to International Law. Although strictly no notification to and recognition by foreign Powers are necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty, or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned. Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition. And although, thirdly, a State can dispose according to discretion of parts of its territory and acquire as much territory as it likes, foreign Powers may intervene for the purpose of maintaining a balance of power or on account of other vital interests.

But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the States concerned. France, for instance, has retained her personal identity from the time the Law of Nations came into existence

until the present day, although she acquired and lost parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance. Even such loss of territory as occasions the reduction of a Great Power to a small Power, or such increase of territory and strength as turns a small State into a Great Power, does not affect a State as an International Person. Thus, although through the events of the years 1859–1861 Sardinia acquired the whole territory of the Italian Peninsula and turned into the Great Power of Italy, she remained one and the same International Person.

§ 78. Changes which affect States as International Persons are of different character.

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,¹ two States which hitherto were separate International Persons are affected in that character by entering into a Real Union. For through that change they appear henceforth together as one and the same International Person. And should this union be dissolved, the member-States are again affected, for they now become again separate International Persons.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper,² but certain restrictions involve inevitably a partial loss of

Changes
affecting
States as
Inter-
national
Persons. X

¹ See below, § 87, where the character of the Real Union is fully discussed.

² See below, §§ 126–127, where the different kinds of these restrictions are discussed. X

independence. Thus if a hitherto independent State comes under the suzerainty of another State and becomes thereby a half-Sovereign State, its character as an International Person is affected. The same is valid with regard to a hitherto independent State which comes under the protectorate of another State. Again, if several hitherto independent States enter into a Federal State, they transfer a part of their sovereignty to the Federal State and become thereby part-Sovereign States. On the other hand, if a vassal State or a State under protectorate is freed from the suzerainty or protectorate, it is thereby affected as an International Person, because it turns now into a full Sovereign State. And the same is valid with regard to a member-State of a Federal State which leaves the union and gains the condition of a full Sovereign State.

(3) States which become permanently neutralised are thereby also affected in their character as International Persons, although their independence remains untouched. But permanent neutralisation alters the condition of a State so much that it thereby becomes an International Person of a particular kind.

Extinction
of Inter-
national
Persons.

§ 79. A State ceases to be an International Person when it ceases to exist. Theoretically such extinction of International Persons is possible through emigration or the perishing of the whole population of a State, or through a permanent anarchy within a State. But it is evident that such cases will hardly ever occur in fact. Practical cases of extinction of States are: Merger of one State into another, annexation after conquest in war, breaking up of a State into several States, and breaking up of a State into parts which are annexed by surrounding States.

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another. In this way the Duchy of Courland merged in 1795 into Russia, the two Principalities of Hohen-

zollern-Hechingen and Hohenzollern-Sigmaringen in 1850 into Prussia, the Congo Free State in 1908 into Belgium, and Korea in 1910 into Japan. And the same is the case if a State is subjugated by another. In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901. An example of the breaking up of a State into different States is the division of the Swiss canton of Basle into Basel-Stadt and Basel-Land in 1833. And an example of the breaking up of a State into parts which are annexed by surrounding States, is the absorption of Poland by Russia, Austria, and Prussia in 1795.

IV

SUCCESSION OF INTERNATIONAL PERSONS¹

Grotius, II. c. 9 and 10—Pufendorf, VIII. c. 12—Hall, §§ 27–29—Phillimore, I. § 137—Lawrence, § 49—Halleck, I. pp. 89–92—Taylor, §§ 164–168—Westlake, I. pp. 68–83—Wharton, I. § 5—Moore, I. §§ 92–99—Wheaton, §§ 28–32—Bluntschli, §§ 47–50—Hartmann, § 12—Heffter, § 25—Holtzendorff in Holtzendorff, II. pp. 33–47—Liszt, § 23—Ullmann, § 32—Bonfils, Nos. 216–233—Despagnet, Nos. 89–102—Pradier-Fodéré, I. Nos. 156–163—Nys, I. pp. 399–401—Rivier, I. § 3, pp. 69–75 and p. 438—Calvo, I. §§ 99–103—Fiore, I. Nos. 349–366—Martens, I. § 67—Appleton, “Des effets des annexions sur les dettes de l’état démembré ou annexé” (1895)—Huber, “Die Staatensuccession” (1898)—Keith, “The Theory of State Succession, with special reference to English and Colonial Law” (1907)—Cavaglieri, “La dottrina della successione di stato a stato, &c.” (1910)—Richards in *The Law Magazine and Review*, XXVIII. (1903), pp. 129–141—Keith in Z.V. III. (1909), pp. 618–648—Hershey in A.J. V. (1911), pp. 285–297.

§ 80. Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless the following common doctrine can be stated to exist.

A succession of International Persons occurs when

Common
Doctrine
regarding
Succession of
Inter-
national
Persons.

¹ The following text treats only of the broad outlines of the subject, as the practice of the States has hardly settled more than general principles. Details must be studied in Huber, “Die Staatensuccession” (1898), and

Keith, “The Theory of State Succession, &c.” (1907); the latter writer’s analysis of cases in Z.V. III. (1909), pp. 618–648, is likewise very important.

one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition.

Universal succession takes place when one International Person is absorbed by another, either through subjugation or through voluntary merger. And universal succession further takes place when a State breaks up into parts which either become separate International Persons of their own or are annexed by surrounding International Persons.

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person; secondly, when one International Person acquires a part of the territory of another through cession; thirdly, when a hitherto full Sovereign State loses part of its independence through entering into a Federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full Sovereign State becomes full Sovereign; fourthly, when an International Person becomes a member of a Real Union or *vice versa*.

Nobody ever maintained that on the successor devolve all the rights and duties of his predecessor. But after stating that a succession takes place, the respective writers try to educe the consequences and to make out what rights and duties do, and what do not, devolve.

Several writers,¹ however, contest the common doctrine and maintain that a succession of International Persons never takes place. Their argument is that the rights and duties of an International Person disappear with the extinguished Person or become modified according to the modifications an International Person undergoes through losing part of its sovereignty.

¹ See Gareis, pp. 66-70, who discusses the matter with great clearness, and Liszt, § 23.

§ 81. If the real facts of life are taken into consideration, the common doctrine cannot be upheld. To say that succession takes place in such and such cases and to make out afterwards what rights and duties devolve, shows a wrong method of dealing with the problem. It is certain that no *general* succession takes place according to the Law of Nations. With the extinction of an International Person disappear its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International Person following another in the possession of State territory, there is no doubt that, as far as these devolving rights and duties are concerned, a succession of one International Person to the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly.

How far
Succession
actually
takes
place.

§ 82. When a State merges voluntarily into another State—as, for instance, Korea in 1910 did into Japan—or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person. No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them. They are personal treaties, and they naturally, legally, and necessarily presuppose the existence of the contracting State. But it is controversial whether treaties

Succession in
consequence of
Absorption.

of commerce, extradition, and the like, of the extinct State remain valid and therefore a succession takes place. The majority of writers correctly, I think, answer the question in the negative, because such treaties, although they are non-political in a sense, possess some prominent political traits.¹

A real succession takes place, however, first, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like. According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain valid, and all rights and duties arising from such treaties of the extinct State devolve on the absorbing State.

A real succession, secondly, takes place with regard

¹ On the whole question concerning the extinction of treaties in consequence of the absorption of a State by another, see Moore, V. § 773, and below, § 548. When, in 1910, Korea merged into Japan, the latter published a Declaration—see Martens, N.R.G. 3rd Ser. IV. p. 26—containing the following articles with regard to the treaty obligations of the extinct State of Korea:—

1. Treaties hitherto concluded by Korea with foreign Powers ceasing to be operative, Japan's existing treaties will, so far as practicable, be applied to Korea. Foreigners resident in Korea will, so far as conditions permit, enjoy the same rights and immunities as in Japan proper, and the protection of their legally acquired rights subject in all cases to the jurisdiction of Japan. The Imperial Government of Japan is ready to consent that the jurisdiction in respect of the cases actually pending in any foreign Consular Court in Korea at the time the Treaty of Annexation takes effect shall remain in such Court until final decision.

2. Independently of any conventional engagements formerly existing on the subject, the Imperial Government of Japan will for a period of

ten years levy upon goods imported into Korea from foreign countries or exported from Korea to foreign countries and upon foreign vessels entering any of the open ports of Korea the same import or export duties and the same tonnage dues as under the existing schedules. The same import or export duties and tonnage dues as those to be levied upon the aforesaid goods and vessels will also for a period of ten years be applied in respect of goods imported into Korea from Japan or exported from Korea to Japan and Japanese vessels entering any of the open ports of Korea.

3. The Imperial Government of Japan will also permit for a period of ten years vessels under flags of the Powers having treaties with Japan to engage in the coasting trade between the open ports of Korea and between those ports and any open port of Japan.

4. The existing open ports of Korea, with the exemption of Masampo, will be continued as open ports, and in addition Shiwiju will be newly opened so that vessels, foreign as well as Japanese, will there be admitted and goods may be imported into and exported from these ports.

to the fiscal property and the fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.¹ But the debts² of the extinct State must, on the other hand, also be taken over by the absorbing State.³ The private creditor of an extinct State certainly acquires no right⁴ by International Law against the absorbing State, since the Law of Nations is a law between States only and exclusively. But if he is a foreigner, the right of protection due to his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State. Some jurists⁵ go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds. But I doubt whether in such cases the practice of the States would follow that opinion. On the other hand, a State which has subjugated another would be compelled⁶ to take over even

¹ This was recognised by the High Court of Justice in 1866 in the case of the United States *v.* Priolean. See Scott, "Cases on International Law" (1902), p. 85.

² See Moore, I. § 97, and Appleton, "Des effets des annexions de territoires sur les dettes, &c." (1895).

³ This is almost generally recognised by writers on International Law and the practice of the States. (See Huber, *op. cit.* pp. 156 and 262, note 449.) The Report of the Transvaal Concessions Commission (see British State Papers, South Africa, 1901, Cd. 623), although it declares (p. 7), that "it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist," nevertheless agrees that "the modern usage of nations has tended in the acknowledgment of such contracts." It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in exist-

ence with regard to this point. (See Hall, § 29, and Westlake in *The Law Quarterly Review*, XVII. (1901), pp. 392-401, XXXI. (1905), p. 335, and now Westlake, I. pp. 74-82.)

⁴ This is the real portent of the judgment in the case of Cook *v.* Sprigg, L.R. (1899), A.C. 572, and in the case of the West Rand Central Gold Mining Co. *v.* The King (1905), 2 K.B. 391. In so far as the latter judgment denies the existence of a rule of International Law that compels a subjugator to pay the debts of the subjugated State, its arguments are in nowise decisive. An International Court would recognise such a rule.

⁵ See Martens, I. § 67; Heffter, § 25; Huber, *op. cit.* p. 158.

⁶ See the Report of the Transvaal Concession Commission, p. 9, which maintains the contrary. Westlake (I. p. 78) adopts the reasoning of this report, but his arguments are not decisive. The lending of money to a belligerent under ordinary

such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation.¹

The case of a Federal State arising—like the German Empire in 1871—above a number of several hitherto full Sovereign States also presents, with regard to many points, a case of State succession.² However, no hard-and-fast rules can be laid down concerning it, since everything depends upon the question whether the Federal State is one which—like all those of America—totally absorbs all international relations of the member-States, or whether it absorbs—like the German Empire and Switzerland—these relations to a greater extent only.³

Succession in consequence of Dismemberment.

§ 83. When a State breaks up into fragments which themselves become States and International Persons, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another. A difficulty is, however, created when the territory of the extinct State is absorbed by several States. Succession actually takes place here too, first, with regard to the international rights and duties locally connected with those parts of the territory which the respective States have absorbed. Succession takes place, secondly, with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs.

mercantile conditions—see Barclay in *The Law Quarterly Review*, XXI. (1905), p. 307—is not prohibited by International Law, although the carriage of such funds in cash on neutral vessels to the enemy falls under the category of carriage of contraband, and can be punished by the belligerents. (See below, Vol. II. § 352.)

¹ The question how far concessions granted by a subjugated State

to a private individual or to a company must be upheld by the subjugating State, is difficult to answer in its generality. The merits of each case would seem to have to be taken into consideration. See Westlake, I. p. 82; Moore, I. § 98; Gidel, "Des effets de l'annexion sur les concessions" (1904).

² See Huber, op. cit. pp. 163–169, and Keith, op. cit. pp. 92–98.

³ See below, § 89.

And the debts of the extinct State must be taken over. But the case is complicated through the fact that there are several successors to the fiscal property and funds, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors.

When—as in the case of Sweden-Norway in 1905—a Real Union¹ is dissolved and the members become International Persons of their own, a succession likewise takes place. All treaties concluded by the Union devolve upon the former members, except those which were concluded by the Union for one member only—*e.g.* by Sweden-Norway for Norway—and which, therefore, devolve upon such former member only, and, further, except those which concerned the very Union and lose all meaning by its dissolution.

§ 84. When in consequence of war or otherwise one State cedes a part of its territory to another, or when a part of the territory of a State breaks off and becomes a State and an International Person of its own, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property found on that part of the territory. It would only be just, if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of International Law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.² Thus, for instance, arts. 9, 33, 42 of the Treaty of Berlin³ of 1878 stipulate that Bulgaria, Montenegro, and Servia should take over a part of the Turkish debt. On the

Succession in case of Separation or Cession.

¹ See below, § 87.

² Many writers, however, maintain that there is such a rule of International Law. See Huber, *op. cit.*

Nos. 125–135 and 205, where the respective treaties are enumerated.

³ See Martens, *N.R.G.* 2nd Ser. III. p. 449.

other hand, the United States refused, after the cession of Cuba in 1898, to take over from Spain the so-called Cuban debt—that is, the debt which was settled by Spain on Cuba before the war.¹ Spain argued that it was not intended to transfer to the United States a proportional part of the debt of Spain, but only such debt as attached individually to the island of Cuba.

The United States, however, met this argument by the correct assertion that the debt concerned was not one incurred by Cuba, but by Spain, and settled by her on Cuba.

V

COMPOSITE INTERNATIONAL PERSONS

Pufendorf, VII. c. 5—Hall, § 4—Westlake, I. pp. 31–37—Phillimore, I. §§ 71–74, 102–105—Twiss, I. §§ 37–60—Halleck, I. pp. 70–74—Taylor, §§ 120–130—Wheaton, §§ 39–51—Moore, I. §§ 6–11—Hartmann, § 70—Heffter, §§ 20–21—Holtzendorff in Holtzendorff, II. pp. 118–141—Liszt, § 6—Ullmann, §§ 20–24—Bonfils, Nos. 165–174—Despagnet, Nos. 109–126—Pradier-Fodéré, I. Nos. 117–123—Mérignhac, II. pp. 6–42—Nys, I. pp. 367–378—Rivier, I. §§ 5–6—Calvo, I. §§ 44–61—Fiore, I. Nos. 335–339, and Code, Nos. 96–104—Martens, I. §§ 56–59—Pufendorf, “De systematibus civitatum” (1675)—Jellinek, “Die Lehre von den Staatenverbindungen” (1882)—Borel, “Etude sur la souveraineté de l’Etat fédératif” (1886)—Brie, “Theorie der Staatenverbindungen” (1886)—Hart, “Introduction to the Study of Federal Government” in “Harvard Historical Monographs,” 1891 (includes an excellent bibliography)—Le Fur, “Etat fédéral et confédération d’Etats” (1896)—Moll, “Der Bundestaatsbegriff in den Vereinigten Staaten von America” (1905)—Ebers, “Die Lehre von Staatenbunde” (1910).

Real and
apparent
Composite
Inter-
national
Persons.

§ 85. International Persons are as a rule single Sovereign States. In such single States there is one central political authority as Government which represents the State, within its borders as well as without in the international intercourse with other International Persons. Such single States may be called *simple* International Persons. And a State remains a *simple*

¹ See Moore, III. § 97, pp. 351–385.

International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves. Great Britain is a simple International Person, although the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa, are now States of their own, because Great Britain is alone Sovereign and represents exclusively the British Empire within the Family of Nations.

Historical events, however, have created, in addition to the simple International Persons, composite International Persons. A composite International Person is in existence when two or more Sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great extent as one single International Person. History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, a so-called Personal Union and the union of so-called Confederated States are not International Persons.¹

§ 86. A Personal Union is in existence when two Sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch. Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg, and from 1885 to 1908 between

States in
Personal
Union.

¹ I cannot agree with Westlake (I. p. 37) that "the space which some writers devote to the distinctions between the different kinds of union between States" is "disproportioned . . . to their international importance." Very important questions are connected with these distinctions. The

question, for instance, whether a diplomatic envoy sent by Bavaria to this country must be granted the privileges due to a foreign diplomatic envoy depends upon the question whether Bavaria is an International Person in spite of her being a member-State of the German Empire.

Belgium and the former Congo Free State. At present there is no Personal Union in existence. A Personal Union is not, and is in no point treated as though it were, an International Person, and its two Sovereign member-States remain separate International Persons. Theoretically it is even possible that they make war against each other, although practically this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the envoy of both States at the same time, but not the envoy of the Personal Union.

States in
Real
Union.

§ 87. A Real Union¹ is in existence when two Sovereign States are by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not itself a State, but merely a union of two full Sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as they separately are not International Persons. It is, for instance, Austria-Hungary which concludes an international treaty of extradition between Hungary and a foreign Power. The only Real Union at present in existence outside the German Empire² is that of Austria-Hungary, that of Sweden-Norway having been dissolved in 1905.

Austria-Hungary became a Real Union in 1723. In

¹ See Blüthgen in Z.V., I. (1906), pp. 237-263.

Saxe-Coburg and Saxe-Gotha within the German Empire.

² There is a Real Union between

1849, Hungary was united with Austria, but in 1867 Hungary became again a separate Sovereign State and the Real Union was re-established. Their army, navy, and foreign ministry are united. The Emperor-King declares war, makes peace, concludes alliances and other treaties, and sends and receives the same diplomatic envoys for both States.

Sweden-Norway became a Real Union¹ in 1814. The King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States. The Foreign Secretary of Sweden managed at the same time the foreign affairs of Norway. Both States had, however, in spite of the fact that they made one and the same International Person, different commercial and naval flags. The Union was peacefully dissolved by the Treaty of Karlstad of October 26, 1905. Norway became a separate kingdom, the independence and integrity of which is guaranteed by Great Britain, France, Germany, and Russia by the Treaty of Christiania of November 2, 1907.²

§ 88. Confederated States (Staatenbund) are a number of full Sovereign States linked together for the maintenance of their external and internal independence by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member-States, but not over the citizens of these States. Such a union of Confederated States is not any more itself a State than a Real Union is; it is merely an International Confederation of States, a society of international character, since the member-States remain full Sovereign States and separate International Persons. Consequently, the union of Con-

Confederated States (Staatenbund).

¹ This is not universally recognised. Phillimore, I. § 74, maintains that there was a Personal Union between Sweden and Norway, and

Twiss, I. § 40, calls it a Federal Union.

² See above, § 50, p. 75.

federated States is not an International Person, although it is for some parts so treated on account of its representing the compound power of the full Sovereign member-States. The chief and sometimes the only organ of the union is a Diet, where the member-States are represented by diplomatic envoys. The power vested in the Diet is an International Power which does not in the least affect the full sovereignty of the member-States. That power is essentially nothing else than the right of the body of the members to make war against such a member as will not submit to those commandments of the Diet which are in accordance with the Treaty of Confederation, war between the member-States being prohibited in all other cases.

History has shown that Confederated States represent an organisation which in the long run gives very little satisfaction. It is for that reason that the three important unions of Confederated States of modern times—namely, the United States of America, the German, and the Swiss Confederation—have turned into unions of Federal States. Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and from 1815 to 1848, and the Confederation of the Rhine (Rheinbund) from 1806 to 1813. At present there is no union of Confederated States. The last in existence, the major Republic of Central America,¹ which comprised the three full Sovereign States of Honduras, Nicaragua, and San Salvador, and was established in 1895, came to an end in 1898.

Federal
States
(Bundes-
staaten).

§ 89. A Federal State² is a perpetual union of several Sovereign States which has organs of its own and is

¹ See N.R.G. 2nd Ser. XXXII. pp. 276–292.

² The distinction between Confederated States and a Federal State

is not at all universally recognised, and the terminology is consequently not at all the same with all writers on International Law.

~~invested with power, not only over the member-~~
~~States, but also over their citizens.~~ . The union is based,
first, on an international treaty of the member-States,
and, secondly, on a subsequently accepted constitution
of the Federal State. A Federal State is said to be a
real State side by side with its member-States because
its organs have a direct power over the citizens of those
member-States. This power was established by Ameri-
can¹ jurists of the eighteenth century as a character-
istic distinction of a Federal State from Confederated
States, and Kent as well as Story, the two later
authorities on the Constitutional Law of the United
States, adopted this distinction, which is indeed kept
up until to-day by the majority of writers on politics.
Now if a Federal State is recognised as a State of its
own, side by side with its member-States, it is evident
that sovereignty must be divided between the Federal
State on the one hand, and, on the other, the member-
States. This division is made in this way, that the com-
petence over one part of the objects for which a State is
in existence is handed over to the Federal State, whereas
the competence over the other part remains with the
member-States. Within its competence the Federal State
can make laws which bind the citizens of the member-
States directly without any interference of these member-
States. On the other hand, the member-States are
totally independent as far as *their* competence reaches.

¹ When in 1787 the draft of the new Constitution of the United States, which had hitherto been Confederated States only, was under consideration by the Congress at Philadelphia, three members of the Congress—namely, Alexander Hamilton, James Madison, and John Jay—made up their minds to write newspaper articles on the draft Constitution with the intention of enlightening the nation which had to vote for the draft. For this purpose they divided the different

points among themselves and treated them separately. All these articles, which were not signed with the names of their authors, appeared under the common title "The Federalist." They were later on collected into book-form and have been edited several times. It is especially Nos. 15 and 16 of "The Federalist" which establish the difference between Confederated States and a Federal State in the way mentioned in the text above.

For International Law this division of competence is only of interest in so far as it concerns competence in *international* matters. Since it is always the Federal State which is competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances and other political treaties, the Federal State, if recognised, is certainly an International Person of its own, with all the rights and duties of a sovereign member of the Family of Nations. On the other hand, the international position of the member-States is not so clear. It is frequently maintained that they have totally lost their position within the Family of Nations. But this opinion cannot stand if compared with the actual facts. (Thus, the member-States of the Federal State of Germany have retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States. ² Further, the reigning monarchs of these member-States are still treated by the practice of the States as heads of Sovereign States, a fact without legal basis if these States were no longer International Persons. ³ Thirdly, the member-States of Germany as well as of Switzerland have retained their competence to conclude international treaties between themselves without the consent of the Federal State, and they have also retained the competence to conclude international treaties with foreign States as regards matters of minor interest. If these facts ¹ are taken into consideration, one is obliged to acknowledge that the member-States of a Federal State can be International Persons in a degree. Full subjects of International Law, International Persons with all the rights and duties regularly connected with the membership of the Family of Nations, they

¹ See Riess, " Auswärtige Hoheitsrechte der deutschen Einzelstaaten " (1905).

certainly cannot be. Their position, if any, within this circle is overshadowed by their Federal State, they are part-Sovereign States, and they are, consequently, International Persons for some parts only.

But it happens frequently that a Federal State assumes *in every way* the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American Federal States whose Constitution is formed according to the model of that of the United States. Here the member-States are sovereign too, but only with regard to *internal*¹ affairs. All their external sovereignty being absorbed by the Federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts.

This being so, two classes of Federal States must be distinguished² according to whether their member-States are or are not International Persons, although Federal States are in any case composite International Persons. And whenever a Federal State comes into existence which leaves the member-States for some parts International Persons, the recognition granted to it by foreign States must include their readiness to recognise for the future, on the one hand, the body of the member-States, the Federal State, as one composite International Person regarding all important matters, and, on the other hand, the single member-States as International Persons with regard to less important matters and side by side with the Federal State. That such a condition

¹ The Courts of the United States of America have always upheld the theory that the United States are sovereign as to all powers of government actually surrendered, whereas each member-State is sovereign as to all powers reserved. See Merriam,

"History of the Theory of Sovereignty since Rousseau" (1900), p. 163.

² This distinction is of the greatest importance and ought to be accepted by the writers on the science of politics.

of things is abnormal and illogical cannot be denied, but the very existence of a Federal State side by side the member-States is quite as abnormal and illogical.

The Federal States in existence are the following :—
The United States of America since 1787, Switzerland since 1848, Germany since 1871, Mexico since 1857, Argentina since 1860, Brazil since 1891, Venezuela since 1893.

VI

VASSAL STATES

Hall, § 4—Westlake, I. pp. 25–27—Lawrence, § 39—Phillimore, I. §§ 85–99—Twiss, I. §§ 22–36, 61–73—Taylor, §§ 140–144—Wheaton, § 37—Moore, I. § 13—Bluntschli, §§ 76–77—Hartmann, § 16—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98–117—Liszt, § 6—Ullmann, § 25—Gareis, § 15—Bonfils, Nos. 188–190—Despagnet, Nos. 127–129—Mérignhac, I. pp. 201–218—Pradier-Fodéré, I. Nos. 109–112—Nys, I. pp. 357–364—Rivier, I. § 4—Calvo, I. §§ 66–72—Fiore, I. No. 341, and Code, Nos. 105–110—Martens, I. §§ 60–61—Stubbs, “Suzerainty” (1884)—Baty, “International Law in South Africa” (1900), pp. 48–68—Boghitchévitch, “Halbsouveränität” (1903).

The Union
between
Suzerain
and Vassal
State.

§ 90. The union and the relations between a Suzerain and its Vassal State create much difficulty in the science of the Law of Nations. As both are separate States, a union of States they certainly make, but it would be wrong to say that the Suzerain State is, like the Real Union of States or the Federal State, a composite International Person. And it would be equally wrong to maintain either that a Vassal State cannot be in any way a separate International Person of its own, or that it is an International Person of the same kind as any other State. What makes the matter so complicated, is the fact that a general rule regarding the relation between the suzerain and vassal, and, further, regarding the position, if any, of the vassal within the Family of Nations, cannot be laid down, as everything depends upon the special case. What can and must be said is

that there are some States in existence which, although they are independent of another State as regards their internal affairs, are as regards their international affairs either absolutely or for the most part dependent upon another State. They are called half-Sovereign¹ States because they are sovereign within their borders but not without. The full Sovereign State upon which such half-Sovereign States are either absolutely or for the most part internationally dependent, is called the Suzerain State.

Suzerainty is a term which originally was used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law only. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. Modern suzerainty contains only a few rights of the Suzerain State over the Vassal State which can be called constitutional rights. The rights of the Suzerain State over the Vassal are principally international rights, of whatever they may consist. Suzerainty is by no means sovereignty. If it were, the Vassal State could not be Sovereign in its domestic affairs and could never have any international relations whatever of its own. And why should suzerainty be distinguished from sovereignty if it be a term synonymous with sovereignty? One may correctly maintain that *suzerainty is a kind of international guardianship*, since the Vassal State is either absolutely or mainly represented internationally by the Suzerain State.

§ 91. The fact that the relation between the suzerain and the vassal always depends upon the special case, excludes the possibility of laying down a general rule as regards the position of Vassal States within the Family

Inter-
national
Position
of Vassal
States.

¹ In contradistinction to the States which are under suzerainty or protectorate, and which are commonly

called *half-Sovereign States*, I call member-States of a Federal State *part-Sovereign States*.

of Nations. It is certain that a Vassal State as such need not have any position whatever within the Family of Nations. In every case in which a Vassal State has absolutely no relations whatever with other States, since the suzerain absorbs these relations entirely, such vassal remains nevertheless a half-Sovereign State on account of its internal independence, but it has no position whatever within the Family of Nations, and consequently is for no part whatever an International Person and a subject of International Law. This is the position of the Indian Vassal States of Great Britain, which have no international relations whatever either between themselves or with foreign States.¹ Yet instances can be given which demonstrate that Vassal States can have some small and subordinate position within that family, and that they must in consequence thereof in some few points be considered as International Persons. Thus Egypt can conclude commercial and postal treaties with foreign States without the consent of suzerain Turkey, and Bulgaria could, while she was under Turkish Suzerainty, conclude treaties regarding railways, post, and the like. Thus, further, Egypt can send and receive consuls as diplomatic agents, and so could Bulgaria while she was a Turkish Vassal State. Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with other States, provided Great Britain did not interpose a *veto* within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State. Again, Egypt possesses, since 1898, together with Great Britain *condominium*² over the Soudan, which means that they

¹ See Westlake, Chapters, pp. 211-219; Westlake, I. pp. 41-43, and again Westlake in *The Law Quarterly Review*, XXVI. (1910), pp. 312-319—

See also Lee-Warner, "The Native States of India" (1910), pp. 254-279.

² See below, § 171.

exercise conjointly sovereignty over this territory. Although Vassal States have not the right to make war independently of their suzerain, Bulgaria, at the time a Vassal State, nevertheless fought a war against the full-Sovereign Serbia in 1885, and Egypt conquered the Soudan conjointly with Great Britain in 1898.

How could all these and other facts be explained, if Vassal States could never for some small part be International Persons ?

Side by side with these facts stand, of course, other facts which show that for the most part the Vassal State, even if it has some small position of its own within the Family of Nations, is considered a mere portion of the Suzerain State. Thus all international treaties concluded by the Suzerain State are *ipso facto* concluded for the vassal, if an exception is not expressly mentioned or self-evident. Thus, again, war of the suzerain is *ipso facto* war of the vassal. Thus, thirdly, the suzerain bears within certain limits a responsibility for actions of the Vassal State.

Under these circumstances it is generally admitted that the conception of suzerainty lacks juridical precision, and experience teaches that Vassal States do not remain half-Sovereign for long. They either shake off suzerainty, as Roumania, Serbia, and Montenegro did in 1878, and Bulgaria¹ did in 1908, or they lose their half-Sovereignty through annexation, as in the case of the South African Republic in 1901, or through merger, as when the half-Sovereign Seignory of Kniephausen in Germany merged in 1854 into its suzerain Oldenburg.

Vassal States of importance which are for some parts International Persons are, at present, Egypt,² and

¹ As regards the position of Bulgaria while she was a Vassal State under Turkish suzerainty, see Holland, "The European Concert in the Eastern Question" (1885), pp. 277-307, and Nédjmidin, "Völkerrecht-

liche Entwicklung Bulgariens" (1908).

² See Holland, "The European Concert in the Eastern Question" (1885), pp. 89-205; Grünau, "Die staats- und völkerrechtliche Stellung

Crete.¹ They are both under Turkish suzerainty, although Egypt is actually under the administration of Great Britain. Samos,² which some writers consider a Vassal State under Turkish suzerainty, is not half-Sovereign, but enjoys autonomy to a vast degree.

VII

STATES UNDER PROTECTORATE

Hall, §§ 4 and 38*—Westlake, I. pp. 22–24—Lawrence, § 39—Phillimore, I. 75–82—Twiss, I. §§ 22–36—Taylor, §§ 134–139—Wheaton, §§ 34–36—Moore, I. § 14—Bluntschli, § 78—Hartmann, § 9—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98–117—Gareis, § 15—Liszt, § 6—Ullmann, § 26—Bonfils, Nos. 176–187—Despagnet, Nos. 130–136—Mérignhac, II. pp. 180–220—Pradier-Fodéré, I. Nos. 94–108—Nys, I. pp. 364–366—Rivier, I. § 4—Calvo, I. §§ 62–65—Fiore, I. § 341, and Code, Nos. 111–118—Martens, I. §§ 60–61—Pillet in R.G. II. (1895), pp. 583–608—Heilborn, "Das völkerrechtliche Protectorat" (1891)—Engelhardt, "Les Protectorats, &c." (1896)—Gairal, "Le protectorat international" (1896)—Despagnet, "Essai sur les protectorats" (1896)—Boghitchévitch, "Halbsouveränität" (1903).

Concep-
tion of
Protec-
torate.

§ 92. Legally and materially different from suzerainty is the relation of protectorate between two States. It happens that a weak State surrenders itself by treaty into the protection of a strong and mighty State in such a way that it transfers the management³ of all its more important⁴ international affairs to the protecting State. Through such treaty an international

Aegyptens" (1903); Cocheris, "Situation internationale de l'Egypte et du Soudan" (1903); Freycinet, "La question d'Egypte" (1905); Moret in R.J. XIV. (1907), pp. 405–416; Lamba in R.G. XVII. (1910), pp. 36–55. In the case of the "Charkieh," 1873, L.R. 4 Adm. and Eccl. 59, the Court refused to acknowledge the half-sovereignty of Egypt; see Phillimore, I. § 99.

¹ See Streit in R.G. X. (1903), pp. 399–417.

² See Albrecht in Z.V. I. (1907), pp. 56–112.

³ A treaty of protectorate must not be confounded with a treaty of protection in which one or more strong States promise to protect a weak State without absorbing the international relations of the latter.

⁴ That the admittance of Consuls belongs to these affairs became apparent in 1906, when Russia, after some hesitation, finally agreed upon Japan, and not Korea, granting the *exequatur* to the Consul-general appointed by Russia for Korea, which was then a State under Japanese protectorate. See below, § 427.

union is called into existence between the two States, and the relation between them is called protectorate. The protecting State is internationally the superior of the protected State, the latter has with the loss of the management of its more important international affairs lost its full sovereignty and is henceforth only a half-Sovereign State. Protectorate is, however, a conception which, just like suzerainty, lacks exact juristic precision,¹ as its real meaning depends very much upon the special case. Generally speaking, protectorate may, again like suzerainty, be called *a kind of international guardianship*.

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly specialises it by enumerating the reciprocal rights and duties of the protecting and the protected State. Each case must therefore be treated according to its own merits. Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided according to the terms of the individual treaty of protectorate. In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally. But it is characteristic of the protectorate, in contradistinction to suzerainty, that the protected State always has and retains for some parts a position of its own within the Family of Nations, and that it is always for some parts an International Person and a subject of

Inter-
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position of
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under Pro-
tectorate.

¹ It is therefore of great importance that the parties should make quite clear the meaning of a clause which is supposed to stipulate a protectorate. Thus art. 17 of the Treaty of Friendship and Commerce between Italy and Abyssinia, signed

at Ucciali on May 2, 1889—see Martens, N.R.G. 2nd Ser. XVIII. p. 697—was interpreted by Italy as establishing a protectorate over Abyssinia, but the latter refused to recognise it.

International Law. It is never in any respect considered a mere portion of the superior State. It is, therefore, not necessarily a party in a war¹ of the superior State against a third, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State. And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly.

In Europe there are at present only two very small States under protectorate—namely, the republic of Andorra, under the joint protectorate of France and Spain,² and the republic of San Marino, an enclosure of Italy, which was formerly under the protectorate of the Papal States and is now under that of Italy. The Principality of Monaco, which was under the protectorate, first of Spain until 1693, afterwards of France until 1815, and then of Sardinia, has now, through custom, become a full-Sovereign State, since Italy has never³ exercised the protectorate. The Ionian Islands, which were under British protectorate from 1815, merged into the Kingdom of Greece in 1863.

Protec-
torates
outside
the
Family of
Nations.

§ 94. Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them to full membership of the Family of Nations, apart from the protectorate under which they are now. And it may therefore be questioned whether they have any real position within the Family of Nations at all. As the protectorate over them is recognised by third States, the latter are legally prevented from exer-

¹ This was recognised by the English Prize Courts during the Crimean War with regard to the Ionian Islands, which were then still under British protectorate; see the case of the Ionian Ships, 2 Spinks 212, and Phillimore, I. § 77.

² This protectorate is exercised for Spain by the Bishop of Urgel. As regards the international position of Andorra, see Vilar, "L'Andorre" (1905).

³ This is a clear case of *desuetudo*.

cising any political influence in these protected States, and, failing special treaty rights, they have no right to interfere if the protecting State annexes the protected State and makes it a mere colony of its own, as, for instance, France did with Madagascar in 1896. Protectorates of this kind are actually nothing else than the first step to annexation.¹ Since they are based on treaties with real States, they cannot in every way be compared with the so-called protectorates over African tribes which European States acquire through a treaty with the chiefs of these tribes, and by which the respective territory is preserved for future occupation on the part of the so-called protector.² But actually they always lead to annexation, if the protected State does not succeed in shaking off by force the protectorate, as Abyssinia did in 1896 when she shook off the pretended Italian protectorate.

VIII

NEUTRALISED STATES

Westlake, I. pp. 27-30—Lawrence, §§ 43 and 225—Taylor, § 133—Moore, I. § 12—Bluntschli, § 745—Heffter, § 145—Holtzendorff in Holtzendorff, II. pp. 643-646—Gareis, § 15—Liszt, § 6—Ullmann, § 27—Bonfils, Nos. 348-369—Despagnet, Nos. 137-146—Mérignhac, II. pp. 56-65—Pradier-Fodéré, II. Nos. 1001-1015—Nys, I. pp. 379-398—Rivier, I. § 7—Calvo, IV. §§ 2596-2610—Piccioni's "Essai sur la neutralité perpétuelle" (2nd ed. 1902)—Regnault, "Des effets de la neutralité perpétuelle" (1898)—Tswettcoff, "De la situation juridique des états neutralisés" (1895)—Morand in R.G. I. (1894), pp. 522-537—Hagerup in R.G. XII. (1909), pp. 577-602—Nys in R.I. 2nd Ser. II. (1900), pp. 468-583, III. (1901), p. 15—Westlake in R.I. 2nd Ser. III. (1901), pp. 389-397—Winslow in A.J. II. (1908), pp. 366-386—Wicker in A.J. v. (1911), pp. 639-654.

§ 95. A neutralised State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under

Concep-
tion of
Neutral-
ised
States.

¹ Examples of such non-Christian States under protectorate are Zanzibar under Great Britain and Tunis under France.

² See below, § 226, and Perrinjaquet in R.G. XVI. (1909), pp. 316-367.

the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international obligations as could indirectly drag it into war. The reason why a State asks or consents to become neutralised is that it is a weak State and does not want an active part in international politics, being exclusively devoted to peaceable developments of welfare. The reason why the Powers neutralise a weak State may be a different one in different cases. The chief reasons have been hitherto the balance of power in Europe and the interest in keeping up a weak State as a so-called Buffer-State between the territories of Great Powers.

Not to be confounded with neutralisation of States is neutralisation of parts of States,¹ of rivers, canals, and the like, which has the effect that war cannot there be made and prepared.

Act and
Condition
of Neutra-
lisation.

§ 96. Without thereby becoming a neutralised State, every State can conclude a treaty with another State and undertake the obligation to remain neutral if such other State enters upon war. The act through which a State becomes a neutralised State for all the future is always an international treaty of the Powers between themselves and between the State concerned, by which treaty the Powers guarantee collectively the independence and integrity of the latter State. If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent by taking up an attitude which shows that they agree to the neutralisation, although they do not guarantee it. In guaranteeing the permanent neutrality of a State the contracting Powers enter into the obligation not to violate on their part the independence of the neutral State and to prevent other States from such violation. But the neutral State becomes, apart from

¹ See below, Vol. II. § 72.

the guaranty, in no way dependent upon the guarantors, and the latter gain no influence whatever over the neutral State in matters which have nothing to do with the guaranty.

The condition of the neutralisation is that the neutralised State abstains from any hostile action, and further from any international engagement which could indirectly¹ drag it into hostilities against any other State. And it follows from the neutralisation that the neutralised State can, apart from frontier regulations, neither cede a part of its territory nor acquire new parts of territory without the consent of the Powers.²

§ 97. Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guaranty, and the like, it is frequently maintained that neutralised States are part-Sovereign only and not International Persons of the same position within the Family of Nations as other States. This opinion has, however, no basis if the real facts and conditions of the neutralisation are taken into consideration. If sovereignty is nothing else than supreme authority, a neutralised State is as fully Sovereign as any not neutralised State. It is entirely independent outside as well as inside its borders, since independence does not at all mean boundless liberty of action.³ Nobody maintains that the guaranteed protection of the independence and integrity of the neutralised State places this State under the protectorate or any other kind of authority of the

Inter-
national
position of
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ised
States.

¹ It was, therefore, impossible for Belgium, which was a party to the treaty that neutralised Luxemburg in 1867, to take part in the guarantee of this neutralisation. See article 2 of the Treaty of London of May 11, 1867: "sous la sanction de la garantie collective des puissances signataires, à l'exception de la Belgique, qui est elle-même un état neutre."

² This is a much discussed and very controverted point. See Descamps, "La Neutralité de la Belgique" (1902), pp. 508-527; Fauchille in R.G. II. (1895), pp. 400-439; Westlake in R.I. 2nd Ser. III. (1901), p. 396; Graux in R.I. 2nd Ser. VII. (1905), pp. 33-52; Rivier, I. p. 172. See also below, § 215.

³ See below, § 126.

guarantors. And the condition of the neutralisation to abstain from war, treaties of alliance, and the like, contains restrictions which do in no way destroy the full sovereignty of the neutralised State. Such condition has the consequence only that the neutralised State exposes itself to an intervention by right, and loses the guaranteed protection in case it commits hostilities against another State, enters into a treaty of alliance, and the like. Just as a not-neutralised State which has concluded treaties of arbitration with other States to settle all conflicts between one another by arbitration has not lost part of its sovereignty because it has thereby to abstain from arms, so a neutralised State has not lost part of its sovereignty through entering into the obligation to abstain from hostilities and treaties of alliance. This becomes quite apparent when it is taken into consideration that a neutralised State not only can conclude treaties of all kinds, except treaties of alliance, guarantee, and the like, but can also have an army and navy¹ and can build fortresses, as long as this is done with the purpose of preparing defence only. Neutralisation does not even exercise an influence upon the rank of a State. Belgium, Switzerland, and Luxemburg are States with royal honours and do not rank behind Great Britain or any other of the guarantors of their neutralisation. Nor is it denied that neutralised States, in spite of their weakness and comparative unimportance, can nevertheless play an important part within the Family of Nations. Although she has no voice where history is made by the sword, Switzerland has exercised great influence with regard to several points of progress in International Law. Thus the Geneva Convention owes its existence to the initiative of Switzerland. The fact that a per-

¹ The case of Luxemburg, which became neutralised under the condition not to keep an armed force

with the exception of a police, is an anomaly.

manently neutralised State is in many questions a disinterested party makes such State fit to take the initiative where action by a Great Power would create suspicion and reservedness on the part of other Powers.

But neutralised States are and must always be an exception. The Family and the Law of Nations could not be what they are if ever the number of neutralised States should be much increased. It is neither in the interest of the Law of Nations, nor in that of humanity, that all the small States should become neutralised, as thereby the political influence of the few Great Powers would become still greater than it already is. The neutralised States still in existence—namely, Switzerland, Belgium, and Luxemburg—are a product of the nineteenth century only, and it remains to be seen whether neutralisation can stand the test of history.¹

§ 98. The Swiss Confederation,² which was recognised by the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time. During the French Revolution and the Napoleonic Wars, however, she did not succeed in keeping up her neutrality. French intervention brought about in 1803 a new Constitution, according to which the single cantons ceased to be independent States and Switzerland turned from a Confederation of States into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance linked to France. It was not till 1813 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the

Switzer-
land.

¹ The fate of the Republic of Cracow, which was created an independent State under the joint protection of Austria, Prussia, and Russia by the Vienna Congress in 1815, and permanently neutralised, but which was annexed by Austria in 1846 (see Nys, I. pp. 383–385), cannot be quoted as an example that

neutralised States have no durability. This annexation was only the last act in the drama of the absorption of Poland by her neighbours. As regards the former Congo Free State, see below, § 101.

² See Schweizer, "Geschichte der schweizerischen Neutralität," 2 vols. (1895).

Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon recognised it again.¹ Since that time Switzerland has always succeeded in keeping up her neutrality. She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-German War, she disarmed a French army of more than 80,000 men who had taken refuge on her territory, and guarded them till after the war.

Belgium.

§ 99. Belgium² became neutralised from the moment she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulates in its article 7 at the same time the independence and the permanent neutrality of Belgium, and in its article 25 the guaranty of the signatory five Great Powers.³ And the guaranty was renewed in article 1 of the Treaty of London of April 19, 1839,⁴ to which the same Powers are parties, and which is the final treaty concerning the separation of Belgium from the Netherlands.

Belgium has, just like Switzerland, also succeeded in keeping up her neutrality.⁵ She, too, has built fortresses and possesses a strong army.

Luxemburg.

§ 100. The Grand Duchy of Luxemburg⁵ was since 1815 in personal union with the Netherlands, but at

¹ See Martens, N.R. II. pp. 157, 173, 419, 740.

² See Descamps, "La Neutralité de la Belgique" (1902).

³ See Martens, N.R. XI. pp. 394 and 404.

⁴ See Martens, N.R. XVI. p. 790.

⁵ See Wompach "Le Luxembourg neutre" (1900).

the same time a member of the Germanic Confederation, and Prussia had since 1856 the right to keep troops in the fortress of Luxemburg. In 1866 the Germanic Confederation came to an end, and Napoleon III. made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke of Luxemburg. As Prussia objected to this, it seemed advisable to the Powers to neutralise Luxemburg. A Conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of the neutralisation, which is stipulated and collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, by article 2.¹

The neutralisation took place, however, under the abnormal condition that Luxemburg is not allowed to keep any armed force, with the exception of a police for the maintenance of safety and order, nor to possess any fortresses. Under these circumstances Luxemburg herself can do nothing for the defence of her neutrality, as Belgium and Switzerland can.

§ 101. The former Congo Free State,² which was recognised as an independent State by the Berlin Congo Conference³ of 1884–1885, was a permanently neutralised State from 1885–1908, but its neutralisation was imperfect in so far as it was not guaranteed by the Powers. This fact is explained by the circumstances under which the Congo Free State attained its neutralisation. Article 10 of the General Act of the Congo Conference of Berlin stipulates that the signatory Powers shall respect the neutrality of any territory within the

The
former
Congo
Free
State.

¹ See Martens, N.R.G. XVIII. p. 448.

² Moynier, "La fondation de l'État indépendant du Congo" (1887); Hall, § 26; Westlake, I. p. 30; Navez, "Essai historique sur l'État Indépen-

dant du Congo," Vol. I. (1905); Reeves in A.J. III. (1909), pp. 99–118.

³ See Protocol 9 of that Conference in Martens, N.R.G., 2nd Ser. X. p. 353.

Congo district, provided the Power then or hereafter in possession of the territory proclaims its neutrality. Accordingly, when the Congo Free State was recognised by the Congress of Berlin, the King of the Belgians, as the sovereign of the Congo State, declared¹ it permanently neutral, and this declaration was notified to and recognised by the Powers. Since the Congo Conference did not guarantee the neutrality of the territories within the Congo district, the neutralisation of the Congo Free State was not guaranteed either. In 1908² the Congo Free State merged by cession into Belgium.

IX

NON-CHRISTIAN STATES

Westlake, I. p. 40—Phillimore, I. §§ 27–33—Bluntschli, §§ 1–16—Heffter, § 7—Gareis, § 10—Rivier, I. pp. 13–18—Bonfilis, No. 40—Martens, § 41—Nys, I. pp. 122–125—Westlake, Chapters, pp. 114–143.

No essential difference between Christian and other States.

§ 102. It will be remembered from the previous discussion of the dominion³ of the Law of Nations that this dominion extends beyond the Christian and includes now the Mahometan State of Turkey and the Buddhistic State of Japan. As all full-Sovereign International Persons are equal to one another, no essential difference exists within the Family of Nations between Christian and non-Christian States. That foreigners residing in Turkey are still under the exclusive jurisdiction of their consuls, is an anomaly based on a restriction on territorial supremacy arising partly from custom and partly from treaties. If Turkey could ever succeed, as Japan did, in introducing such reforms as

¹ See Martens, N.R.G. 2nd Ser. XVI. p. 585.

² See Martens, N.R.G. 3rd Ser. II. pp. 101, 106, 109, and Delpech and Marcaggi in R.G. XVIII. (1911), pp. 105–163. The question is doubt-

ful, whether the guarantee of the neutrality of Belgium extends now to territory of the former Congo Free State *ipso facto* by its merger into Belgium.

³ See above, § 28.

would create confidence in the impartiality of her Courts of Justice, this restriction would certainly be abolished.

§ 103. Doubtful is the position of all non-Christian States except Turkey and Japan, such as China, Morocco, Siam, Persia, and further Abyssinia, although the latter is a Christian State, and although China, Persia, and Siam took part in the Hague Peace Conferences of 1899 and 1907. Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible. And neither their governments nor their populations are at present able to fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law. There should be no doubt that these States are not International Persons of the same kind and the same position within the Family of Nations as Christian States. But it is equally wrong to maintain that they are absolutely outside the Family of Nations, and are for no part International Persons. Since they send and receive diplomatic envoys and conclude international treaties, the opinion is justified that such States are International Persons only in some respects—namely, those in which they have expressly or tacitly been received into the Family of Nations. When Christian States begin such intercourse with these non-Christian States as to send diplomatic envoys to them and receive their diplomatic envoys, and when they enter into treaty obligations with them, they indirectly declare that they are ready to recognise them for these parts as International Persons and subjects of the Law of Nations. But for other parts such non-Christian States remain as yet outside the circle of the Family of Nations, especially with regard to war, and they are for those parts treated by the Christian Powers according to discretion. This condition of things will,

Inter-
national
position of
non-
Christian
States
except
Turkey
and Japan.

however, not last very long. It may be expected that with the progress of civilisation these States will become sooner or later International Persons in the full sense of the term. They are at present in a state of transition, and some of them are the subjects of international arrangements of great political importance. Thus by the Treaty of London of December 13, 1906, Great Britain, France, and Italy agree to co-operate in maintaining the independence and integrity of Abyssinia,¹ and the General Act of the Conference of Algeciras of April 7, 1906,² signed by Great Britain, Germany, Austria-Hungary, Belgium, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Sweden, and Morocco herself, endeavours to suppress anarchy in Morocco and to introduce reforms in its internal administration. This Act,³ which recognises, on the one hand, the independence and integrity of Morocco, and, on the other, equal commercial facilities in that country for all nations, contains:—(1) A Declaration concerning the organisation of the Moroccan police; (2) Regulations concerning the detection and suppression of the illicit trade in arms; (3) An Act of concession for a Moorish State Bank; (4) A Declaration concerning an improved yield of the taxes and the creation of new sources of revenue; (5) Regulations respecting customs and the suppression of fraud and smuggling; (6) A Declaration concerning the public services and public works.

¹ See Martens, N.R.G. 2nd Ser. XXXV. p. 556.

² See Martens, N.R.G. 2nd Ser. XXXIV. p. 238.

³ It has been mentioned above, p.

76, that the Moroccan question has been reopened, and that fresh negotiations are taking place for its settlement.

X

THE HOLY SEE

Hall, § 98—Westlake, I. pp. 37-39—Phillimore, I. §§ 278-440—Twiss, I. §§ 206-207—Taylor, §§ 277, 278, 282—Wharton, I. § 70, p. 546—Moore, I. § 18—Bluntschli, § 172—Heffter, §§ 40-41—Geffcken in Holtzendorff, II. pp. 151-222—Gareis, § 13—Liszt, § 5—Ullmann, § 28—Bonfils, Nos. 370-396—Despagnet, Nos. 147-164—Mérignhac, II. pp. 119-153—Nys, II. pp. 297-324—Rivier, I. § 8—Fiore, I. Nos. 520, 521—Martens, I. § 84—Fiore, "Della condizione giuridica internazionale della chiesa e del Papa" (1887)—Bombard, "Le Pape et le droit des gens" (1888)—Imbart-Latour, "La papauté en droit international" (1893)—Olivart, "Le Pape, les états de l'église et l'Italie" (1897)—Chrétien in R.G. VI. (1899) pp. 281-291—Bompert in R.G. VII. (1900), pp. 369-387—Higgins in *The Journal of the Society for Comparative Legislation*, New Series, IX. (1907), pp. 252-264.

§ 104. When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of one of those States—namely, the so-called Papal States. This State owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen III. and Adrian I., who crowned them as Kings of the Franks. It remained in the hands of the Popes till 1798, when it became a republic for about three years. In 1801 the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established, and remained in existence till 1870, when it was annexed to the Kingdom of Italy. Throughout the existence of the Papal States, the Popes were monarchs and, as such, equals of all other monarchs. Their position was, however, even then anomalous, as their influence and the privileges granted to them by the different States were due, not alone to their being monarchs of a State, but to their being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Popes existed within the province of precedence only.

The
former
Papal
States.

The
Italian
Law of
Guaranty.

§ 105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church. It seemed impossible that the Pope should become an ordinary Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church.. To meet the case the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the "Law of Guaranty." According to this the position of the Pope and the Holy See is in Italy as follows:—

The person of the Pope is sacred and inviolable (article 1), although he is subjected to the Civil Courts of Italy.¹ An offence against his person is to be punished in the same way as an offence against the King of Italy (article 2). He enjoys all the honours of a sovereign, retains the privileges of precedence conceded to him by Roman Catholic monarchs, has the right to keep an armed body-guard of the same strength as before the annexation for the safety of his person and of his palaces (article 3), and receives an allowance of 3,225,000 francs (article 4). The Vatican, the seat of the Holy See, and the palaces where a conclave for the election of a new Pope or where an Oecumenical Council meets, are inviolable, and no Italian official is allowed to enter them without consent of the Holy See (articles 5–8). The Pope is absolutely free in performing all the functions connected with his mission as head of the Roman Catholic Church, and so are his officials (articles

¹ See Bonfils, No. 379.

9 and 10). (The Pope has the right to send and to receive envoys, who enjoy all the privileges of the diplomatic envoys sent and received by Italy) (article 11). The freedom of communication between the Pope and the entire Roman Catholic world is recognised, and the Pope has therefore the right to a post and telegraph office of his own in the Vatican or any other place of residence and to appoint his own post-office clerks (article 12). And, lastly, the colleges and other institutions of the Pope for the education of priests in Rome and the environments remain under his exclusive supervision, without any interference on the part of the Italian authorities.

No Pope has as yet recognised this Italian Law of Guaranty, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But practically foreign States as well as the Popes themselves, although the latter have never ceased to protest against the condition of things created by the annexation of the Papal States, have made use of the provisions¹ of that law. Several foreign States send side by side with their diplomatic envoys accredited to Italy special envoys to the Pope, and the latter sends envoys to several foreign States.

§ 106. The Law of Guaranty is not International but Italian Municipal Law, and the members of the Family of Nations have hitherto not made any special arrangements with regard to the International position of the Holy See and the Pope. And, further, there can be no doubt that since the extinction of the Papal States the Pope is no longer a monarch whose sovereignty is derived from his position as the head of a State.) For these reasons many writers² maintain that the Holy See and the Pope have no longer any international

Inter-
national
position of
the Holy
See and
the Pope.

¹ But the Popes have hitherto never accepted the allowance provided by the Law of Guaranty.

² Westlake, I. p. 38, now joins the ranks of these writers.

position whatever according to the Law of Nations, since States only and exclusively are International Persons. But if the facts of international life and the actual condition of things in every-day practice are taken into consideration, this opinion has no basis to stand upon. Although the Holy See is not a State, the envoys sent by her to foreign States are treated by the latter on the same footing with diplomatic envoys as regards exterritoriality, inviolability, and ceremonial privileges, and those foreign States which send envoys to the Holy See claim for them from Italy all the privileges and the position of diplomatic envoys. Further, although the Pope is no longer the head of a State, the privileges due to the head of a monarchical State are still granted to him by foreign States. Of course, through this treatment the Holy See does not acquire the character of an International Person, nor does the Pope thereby acquire the character of a head of a monarchical State. But for some points (the Holy See is actually treated as though she were an International Person, and the Pope is treated actually in every point as though he were the head of a monarchical State. It must therefore be maintained that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a *quasi* international position. This position allows her to claim against all the States treatment on some points as though she were an International Person, and further to claim treatment of the Pope in every point as though he were the head of a monarchical State. But it must be emphasised that, although the envoys sent and received by the Holy See must be treated as diplomatic envoys,¹ they are not such in fact,

¹ The case of Montagnini, which occurred in December 1906, cannot be quoted against this assertion, for Montagnini was not at the time a person enjoying diplomatic privileges. Diplomatic relations between France

and the Holy See had come to an end in 1905 by France recalling her envoy at the Vatican and at the same time sending the passports to Lorenzelli, the Papal Nuncio in Paris. Montagnini, who remained at the

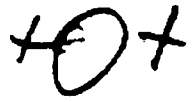
for they are not agents for international affairs of States, but exclusively agents for the affairs of the Roman Catholic Church. And it must further be emphasised that the Holy See cannot conclude international treaties or claim a vote at international congresses and conferences. The so-called Concordats—that is, treaties between the Holy See and States with regard to matters of the Roman Catholic Church—are not international treaties, although analogous treatment is usually given to them. Even formerly, when the Pope was the head of a State, such Concordats were not concluded with the Papal States, but with the Holy See and the Pope as representatives of the Roman Catholic Church.

§ 107. Since the Holy See has no power whatever to protect herself and the person of the Pope against violations, the question as to the protection of the Holy See and the person of the Pope arises. I believe that, since the present international position of the Holy See rests on the tacit consent of the members of the Family of Nations, many a Roman Catholic Power would raise its voice in case Italy or any other State should violate the Holy See or the person of the Pope, and an intervention for the purpose of protecting either of them would have the character of an intervention by right.

Violation
of the
Holy See
and the
Pope.

nunciature in Paris, did not possess any diplomatic character after the departure of the Nuncio. Neither his arrest and his expulsion in December 1906, nor the seizure of his papers at the nunciature amounted therefore to an international delinquency on the part of the French Government. The papers left by the former Papal Nuncio Lorenzelli were not touched and remained in the archives of the former nunciature until the Austrian ambassador in Paris, in February 1907, asked the French Foreign Office to transfer them to him for the purpose of handing them on to the Holy See.

It must be specially mentioned that the seizure of his papers and the arrest and expulsion of Montagnini took place because he conspired against the French Government by encouraging the clergy to refuse obedience to French laws. And it must further be mentioned that Lorenzelli, when he left the nunciature, did not, contrary to all precedent, place the archives of the nunciature under seals and confide them to the protection of another diplomatic envoy in Paris. Details of the case are to be found in R.I. 2nd Ser. IX. (1907), pp. 60-66, and R.G., XIV. (1907), pp. 175-186.

Italy herself would certainly make such a violation by a foreign Power her own affair, although she has no more than any other Power the legal duty to do so, and although she is not responsible to other Powers for violations of the Personality of the latter by the Holy See and the Pope. 

XI

INTERNATIONAL PERSONS OF THE PRESENT DAY

European
States.

§ 108. All the seventy-four European States are, of course, members of the Family of Nations. They are the following :

Great Powers are :

Austria-Hungary.
France.
Germany.

Great Britain.
Italy.
Russia.

Smaller States are :

Bulgaria.
Denmark.
Greece.
Holland.
Montenegro.
Norway.

Portugal.
Roumania.
Servia.
Spain.
Sweden.
Turkey.

Very small, but nevertheless full-Sovereign, States are :

Monaco and Lichtenstein.

Neutralised States are :

Switzerland, Belgium, and Luxemburg.

Half-Sovereign States are :

Andorra (under the protectorate of France and Spain).

San Marino (under the protectorate of Italy).

Crete (under the suzerainty of Turkey).

Part-Sovereign States are :

(a) Member-States of Germany :

Kingdoms : Prussia, Bavaria, Saxony, Würtemberg.

Grand-Duchies : Baden, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg.

Dukedoms : Anhalt, Brunswick, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar.

Principalities : Reuss Elder Line, Reuss Younger Line, Lippe, Schaumburg-Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen Waldeck.

Free Towns are : Bremen, Lübeck, Hamburg.

(b) Member-States of Switzerland :

Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (ob und nid dem Wald), Glarus, Zug, Fribourg, Soleure, Basle (Stadt und Landschaft), Schaffhausen, Appenzell (beider Rhoden), St. Gall, Grisons, Aargau, Thurgau, Tessin, Vaud, Valais, Neuchâtel, Geneva.

§ 109. In America there are twenty-one States which are members of the Family of Nations, but it must be emphasised that the member-States of the five Federal States on the American continent, although they are part-Sovereign, have no footing within the Family of Nations, because the American Federal States, in contradistinction to Switzerland and Germany, absorb all possible international relations of their member-States.

American States.

In North America there are :

The United States of America.

The United States of Mexico.

In Central America there are :

Costa Rica.	Honduras.
Cuba.	Nicaragua.
San Domingo.	Panama (since 1903).
Guatemala.	San Salvador.
Hayti.	

In South America there are :

The United States of	Ecuador.
Argentina.	Paraguay.
Bolivia.	Peru.
The United States of	Uruguay.
Brazil.	The United States
Chili.	of Venezuela.
Colombia.	

African
States.

§ 110. In Africa the Negro Republic of Liberia is the only real and full member of the Family of Nations. Egypt and Tunis are half-Sovereign, the one under Turkish suzerainty, the other under French protectorate. Morocco and Abyssinia are both full-Sovereign States, but for some parts only within the Family of Nations. The Soudan has an exceptional position ; being under the *condominium* of Great Britain and Egypt, a footing of its own within the Family of Nations the Soudan certainly has not.

Asiatic
States.

§ 111. In Asia only Japan is a full and real member of the Family of Nations. Persia, China, Siam, Tibet, and Afghanistan are for some parts only within that family.

CHAPTER II

POSITION OF THE STATES WITHIN THE FAMILY OF NATIONS

I

INTERNATIONAL PERSONALITY

Vattel, I. §§ 13-25—Hall, § 7—Westlake, I. pp. 293-296—Lawrence, § 57—Phillimore, I. §§ 144-147—Twiss, I. § 106—Wharton, § 60—Moore, I. § 23—Bluntschli, §§ 64-81—Hartmann, § 15—Heffter, § 26—Holtzendorff in Holtzendorff, II. pp. 47-51—Gareis, §§ 24-25—Liszt, § 7—Ullmann, § 38—Bonfilis, Nos. 235-241—Despagnet, Nos. 165-166—Nys, II. pp. 176-181—Pradier-Fodéré, I. Nos. 165-195—Mérignhac, I. pp. 233-238—Rivier, I. § 19—Fiore, I. Nos. 367-371—Martens, I. § 72—Fontenay, "Des droits et des devoirs des États entre eux" (1888)—Pillet in R.G., V. (1898), pp. 66 and 236, VI. (1899), p. 503—Cavaglieri, "I diritti fondamentali degli Stati nella Società Internazionale" (1906).

§ 112. Until the last two decades of the nineteenth century all jurists agreed that the membership of the Family of Nations includes so-called fundamental rights for States. Such rights are chiefly enumerated as the right of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. It was and is maintained that these fundamental rights are a matter of course and self-evident, since the Family of Nations consists of Sovereign States. But no unanimity exists with regard to the number, the names, and the contents of these alleged fundamental rights. A great confusion exists in this matter, and hardly two text-book writers agree in details with regard to it. This condition of things has led to a searching criticism of the whole matter,

The so-called Fundamental Rights.

and several writers ¹ have in consequence thereof asked that the fundamental rights of States should totally disappear from the treatises on the Law of Nations. I certainly agree with this. Yet it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations. They are rights and duties which do not rise from international treaties between a multitude of States, but which the States customarily hold as International Persons, and which they grant and receive reciprocally as members of the Family of Nations. They are rights and duties connected with the position of the States within the Family of Nations, and it is therefore only adequate to their importance to discuss them in a special chapter under that heading.

Inter-
national
Person-
ality a
Body of
Qualities.

§ 113. International Personality is the term which characterises fitly the position of the States within the Family of Nations, since a State acquires International Personality through its recognition as a member. What it really means can be ascertained by going back to the basis ² of the Law of Nations. Such basis is the common consent of the States that a body of legal rules shall regulate their intercourse with one another. Now a legally regulated intercourse between Sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain re-

¹ See Stoerk in Holtzendorff's "Encyklopädie der Rechtswissenschaft," 2nd ed. (1890), p. 1291; Jellinek, "System der subjectiven öffentlichen Rechte" (1892), p. 302; Heilborn, "System," p. 279; and others. The arguments of these writers have met, however, considerable resistance, and the existence

of fundamental rights of States is emphatically defended by other writers. See, for instance, Pillet l.c., Liszt, § 7, and Gareis, §§ 24 and 25. Westlake, I. p. 293, now joins the ranks of those writers who deny the existence of fundamental rights.

² See above, § 12.

striction of action in the interest of the liberty of action granted to every other State. [A State that enters into the Family of Nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the interest of that of other States. (In entering into the Family of Nations a State comes as an equal to equals ¹ ; it demands that certain consideration be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. (Recognition of a State as a member of the Family of Nations contains recognition of such State's equality, dignity, independence, and territorial and personal supremacy.) But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the International Personality of a State, and International Personality may therefore be said to be the fact, given by the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State. The States are International Persons because they recognise these qualities in one another and recognise their responsibility for violations of these qualities.]

§ 114. But the position of the States within the Family of Nations is not exclusively characterised by these qualities. The States make a community because there is constant intercourse between them. Intercourse is therefore a condition without which the Family of Nations would not and could not exist. Again, there are exceptions to the protection of the qualities which constitute the International Personality of the States,

Other Characteristics of the position of the States within the Family of Nations.

¹ See above, § 14.

and these exceptions are likewise characteristic of the position of the States within the Family of Nations. Thus, in time of war belligerents have a right to violate one another's Personality in many ways; even annihilation of the vanquished State, through subjugation after conquest, is allowed. Thus, further, in time of peace as well as in time of war, such violations of the Personality of other States are excused as are committed in self-preservation or through justified intervention. And, finally, jurisdiction is also important for the position of the States within the Family of Nations. Intercourse, self-preservation, intervention, and jurisdiction must, therefore, likewise be discussed in this chapter.

II

EQUALITY, RANK, AND TITLES

Vattel, II. §§ 35-48—Westlake, I. pp. 308-312—Lawrence, §§ 112-119—Phillimore, I. § 147, II. §§ 27-43—Twiss, I. § 12—Halleck, I. pp. 116-140—Taylor, § 160—Wheaton, §§ 152-159—Moore, I. § 24—Bluntschli, §§ 81-94—Hartmann, § 14—Heffter, §§ 27-28—Holtzendorff in Holtzendorff, II. pp. 11-14—Ullmann, §§ 36 and 37—Bonfils, Nos. 272-278—Despagnet, Nos. 167-171—Pradier-Fodéré, II. Nos. 484-594—Mérignhac, I. pp. 310-320—Rivier, I. § 9—Nys, II. pp. 194-199, 208-218—Calvo, I. §§ 210-259—Flore, I. Nos. 428-451, and Code, Nos. 388-421—Martens, I. §§ 70-71—Lawrence, Essays, pp. 191-213—Westlake, Chapters, pp. 86-109—Huber, "Die Gleichheit der Staaten" (1909)—Streit in R.I. 2nd Ser. II. pp. 5-27—Hicks in A.J. II. (1908), pp. 530-561.

Legal
Equality
of States.

§ 115. The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.¹ Whatever inequality may exist between States as regards their size, population, power, degree of civilisation, wealth, and other qualities, they are nevertheless equals as International Persons. This legal equality has three important consequences:

¹ See above, §§ 14 and 113.

The first is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only.

The second consequence is that legally—although not politically—the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful. Therefore any alteration of an existing rule or creation of a new rule of International Law by a law-making treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom.

The third consequence is that—according to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another full-Sovereign State. Therefore, although foreign States can sue in foreign Courts,¹ they cannot as a rule be sued² there, unless they voluntarily accept³ the jurisdiction of the Court concerned, or have submitted themselves to such jurisdiction by suing in such foreign Court.⁴

To the rule of equality there are three exceptions:—

First, such States as can for some parts⁵ only be considered International Persons, are not equals of the full members of the Family of Nations.

Secondly, States under suzerainty and under protectorate which are half-Sovereign and under the

¹ See Phillimore, II. § 113 A ; Nys, II. pp. 288–296 ; Loening, "Die Gerichtsbarkeit über fremde Staaten und Souveräne" (1903); and the following cases:—The United States v. Wagner (1867), L.R. 2 Ch. App. 582; The Republic of Mexico v. Francisco de Arrangoiz, and others, 11 Howard's Practice Reports 1 (quoted by Scott, "Cases on International Law," 1902, p. 170); The Sapphire (1870), 11 Wallace, 164. See also below, § 348.

² See *De Haber v. the Queen of Portugal* (1851), 17 Ch. D. 171, and

Vavasseur v. Krupp (1878), L.R. 9 Ch. D. 351.

³ See *Prioleau v. United States, &c.* (1866), L.R. 2 Equity, 656.

⁴ Provided the cross-suit is really connected with the claim in the action. As regards the German case of *Hellfeld v. the Russian Government*, see Köhler in Z.V. IV. (1910), pp. 309–333; the opinions of Laband, Meili, and Senffert, *ibidem*, pp. 334–448; Baty in *The Law Magazine and Review*, XXV. (1909–1910), p. 207; Wolfman in A.J. IV. (1910), pp. 373–383.

⁵ See above, § 103.

guardianship¹ of other States with regard to the management of external affairs, are not equals of States which enjoy full sovereignty.

Thirdly, the part-sovereign member-States of a Federal State are not equals of full-Sovereign States.

It is, however, quite impossible to lay down a hard and fast general rule concerning the amount of inequality between the equal and the unequal States, as everything depends upon the circumstances and conditions of the special case.

Political
Hegemony
of Great
Powers.

§ 116. Legal equality must not be confounded with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, States are in no manner equals, as there is a difference between the Great Powers and others. Eight States must at present be considered as Great Powers—namely, Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, the United States in America, and Japan in Asia. All arrangements made by the body of the Great Powers naturally gain the consent of the minor States, and the body of the six Great Powers in Europe is therefore called the European Concert. The Great Powers are the leaders of the Family of Nations, and every progress of the Law of Nations during the past is the result of their political hegemony, although the initiative towards the progress was frequently taken by a minor Power.

But, however important the position and the influence of the Great Powers may be, they are by no means derived from a legal basis or rule.² It is nothing else than powerful example which makes the smaller States

¹ See above, §§ 91 and 93.

² This is, however, maintained by a few writers. See, for instance, Lorimer, I. p. 170; Lawrence, §§ 113

and 114; Westlake, I. pp. 308, 309; and Pitt Cobbett, "Cases and Opinions on International Law," 2nd ed. vol. I. (1909), p. 50.

agree to the arrangements of the Great Powers. Nor has a State the character of a Great Power by law. It is nothing else than its actual size and strength which makes a State a Great Power. Changes, therefore, often take place. Whereas at the time of the Vienna Congress in 1815 eight States—namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number decreased soon to five, when Portugal, Spain, and Sweden lost that character. But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after the unification of Italy, because the latter became at once a Great Power. The United States rose as a Great Power out of the civil war in 1865, and Japan did the same out of the war with China in 1895. Any day a change may take place and one of the present Great Powers may lose its position, or one of the weaker States may become a Great Power. (It is a question of political influence, and not of law, whether a State is or is not a Great Power.) Whatever large-sized State with a large population gains such strength that its political influence must be reckoned with by the other Great Powers, becomes a Great Power itself.¹

§ 117. Although the States are equals as International Persons, they are nevertheless not equals as regards rank. (The differences as regards rank are recognised by International Law, but the legal equality of States within the Family of Nations is thereby as little affected as the legal equality of the citizens) is

Rank of
States.

¹ In contradistinction to the generally recognised political hegemony of the Great Powers, Lawrence (§§ 113 and 114) and Taylor (§ 69) maintain that the position of the Great Powers is *legally* superior to that of the smaller States, being a "Primacy" or "Overlordship." This doctrine, which professedly seeks to abolish the universally recognised rule of the equality of States, has no sound basis, and confounds political with

legal inequality. I cannot agree with Lawrence when he says (§ 114, p. 276):—" . . . in a system of rules depending, like International Law, for their validity on general consent, what is political is legal also, if it is generally accepted and acted on." The Great Powers are *de facto*, by the smaller States, recognised as political leaders, but this recognition does not involve recognition of legal superiority.

within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law. The vote of a State of lower rank has legally as much weight as that of a State of higher rank. And the difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute. It was in the sixteenth and seventeenth centuries that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance*. The Congress at Vienna of 1815 intended to establish an order of precedence within the Family of Nations, but dropped this scheme on account of practical difficulties. Thus the matter is entirely based on custom, which recognises the following three rules :

(1) The States are divided into two classes—namely, States with and States without royal honours. To the first class belong Empires, Kingdoms, Grand Duchies, and the great Republics such as France, the United States of America, Switzerland, the South American Republics, and others. All other States belong to the second class. The Holy See is treated as though it were a State with royal honours. States with royal honours have exclusively the right to send and receive diplomatic envoys of the first class¹—namely, ambassadors ; and their monarchs address one another as “ brothers ” in their official letters. States with royal honours always precede other States.

(2) Full-Sovereign States always precede those under suzerainty or protectorate.

(3) Among themselves States of the same rank do not precede one another. Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics. But the Roman Catholic States always concede prece-

¹ See below, § 365.

dence to the Holy See, and the monarchs recognise among themselves a difference with regard to ceremonials between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

§ 118. To avoid questions of precedence, on signing a treaty, States of the same rank observe a conventional usage which is called the "Alternat." According to that usage the signatures of the signatory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State. But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*). The
"Alter-
nat."

§ 119. At the present time, States, save in a few exceptional instances, have no titles, although formerly such titles did exist. Thus the former Republic of Venice as well as that of Genoa was addressed as "Serene Republic," and up to the present day the Republic of San Marino¹ is addressed as "Most Serene Republic." Nowadays the titles of the heads of monarchical States are in so far of importance to International Law as they are connected with the rank of the respective States. Since States are Sovereign, they can bestow any titles they like on their heads. Thus, according to the German Constitution of 1871, the Kings of Prussia have the title "German Emperor"; the Kings of England have since 1877 borne the title "Emperor of India"; the Prince of Servia assumed in 1881, that of Roumania in 1882, that of Bulgaria in 1908, and that of Montenegro in 1910, the title "King." But no foreign State is obliged to recognise such a new title, especially when a higher rank would accrue to the respective State in consequence of such a new title of its head. In practice such recognition will regularly be given when the new title really Titles of
States.

¹ See Treaty Series, 1900, No. 9.

corresponds with the size and the importance of the respective State.¹ Servia, Roumania, Bulgaria, and Montenegro had therefore no difficulty in obtaining recognition as kingdoms.

With the titles of the heads of States are connected predicates. Emperors and Kings have the predicate "Majesty," Grand Dukes "Royal Highness," Dukes "Highness," other monarchs "Serene Highness." The Pope is addressed as "Holiness" (*Sanctitas*). Not to be confounded with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations. Thus the Kings of France called themselves *Rex Christianissimus* or "First-born Son of the Church," the Kings of Spain have called themselves since 1496 *Rex Catholicus*, the Kings of England since 1521 *Defensor Fidei*, the Kings of Portugal since 1748 *Rex Fidelissimus*, the Kings of Hungary since 1758 *Rex Apostolicus*.

III

DIGNITY

Vattel, II. §§ 35–48—Lawrence, § 120—Phillimore, II. §§ 27–43—Halleck, I. pp. 124–142—Taylor, § 162—Wheaton, § 160—Bluntschli, §§ 82–83—Hartmann, § 15—Heffter, §§ 32, 102, 103—Holtzendorff in Holtzendorff, II. pp. 64–69—Ullmann, § 38—Bonfils, Nos. 279–284—Despagnet, Nos. 184–186—Moore, I. pp. 310–320—Pradier-Fodéré, II. Nos. 451–483—Rivier, I. pp. 260–262—Nys, II. pp. 212–214—Calvo, III. §§ 1300–1302—Fiore, I. Nos. 439–451—Martens, I. § 78.

Dignity a
Quality.

§ 120. The majority of text-book writers maintain that there is a fundamental right of reputation and of good name belonging to every State. Such a right, however, does not exist, because no duty corresponding

¹ History, however, reports several cases where recognition was withheld for a long time. Thus the title "Emperor of Russia," assumed by Peter the Great in 1701, was not

recognised by France till 1745, by Spain till 1759, nor by Poland till 1764. And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786.

to it can be traced within the Law of Nations. Indeed, the reputation of a State depends just as much upon behaviour as that of every citizen within its boundaries. A State which has a corrupt government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an uncorrupt government and behaves fairly and justly in its international dealings will be highly esteemed. No law can give a good name and reputation to a rogue, and the Law of Nations does not and cannot give a right to reputation and good name to such a State as has not acquired them through its attitude. There are some States—*nomina sunt odiosa!*—which indeed justly possess a bad reputation.

On the other hand, a State as a member of the Family of Nations possesses dignity as an International Person. Dignity is a quality recognised by other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays. Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations.

§ 121. Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial privileges. (These are chiefly the rights to demand—that their heads shall not be libelled and slandered; that their heads and likewise their diplomatic envoys shall be granted exterritoriality and inviolability when abroad, and at home and abroad in the official intercourse with representatives of foreign States shall be granted certain

Consequences of the Dignity of States.

titles ; that their men-of-war shall be granted exterritoriality when in foreign waters ; that their symbols of authority, such as flags and coats of arms, shall not be made improper use of and not be treated with disrespect on the part of other States.) Every State must not only itself comply with the duties corresponding to these rights of other States, but must also prevent its subjects from such acts as violate the dignity of foreign States, and must punish them for acts of that kind which it could not prevent. The Municipal Laws of all States must therefore provide for the punishment of those who commit offences against the dignity of foreign States,¹ and, if the Criminal Law of the land does not contain such provisions, it is no excuse for failure by the respective States to punish offenders. But it must be emphasised that a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, historical verdicts concerning the attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs need neither be suppressed nor punished.

Maritime
Cere-
monials,

§ 122. Connected with the dignity of States are the maritime ceremonials between vessels and between vessels and forts which belong to different States. In former times discord and jealousy existed between the States regarding such ceremonials, since they were looked upon as means of keeping up the superiority of one State over another. Nowadays, so far as the Open Sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States. They are

¹ According to the Criminal Law of England, "every one is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary,

with the intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs." See Stephen, "A Digest of the Criminal Law," article 91.

the outcome of international usages, and not of International Law, in honour of the national flags. They are carried out by dipping flags or striking sails or firing guns.¹ But so far as the territorial maritime belt is concerned, littoral States can make laws concerning maritime ceremonies to be observed by foreign merchantmen.²

IV

INDEPENDENCE AND TERRITORIAL AND PERSONAL SUPREMACY

Vattel, I. Préliminaires, §§ 15-17—Hall, § 10—Westlake, I. pp. 308-312—Lawrence, §§ 58-61—Phillimore, I. §§ 144-149—Twiss, I. § 20—Halleck, I. pp. 93-113—Taylor, § 160—Wheaton, §§ 72-75—Bluntschli, §§ 64-69—Hartmann, § 15—Heffter, §§ 29 and 31—Holtzendorff in Holtzendorff, II. pp. 36-60—Gareis, §§ 25-26—Ullmann, § 38—Bonfils, Nos. 253-271—Despagnet, Nos. 187-189—Mérignhac, I. pp. 233-383—Pradier-Fodéré, I. Nos. 287-332—Rivier, I. § 21—Nys, II. pp. 182-184—Calvo, I. §§ 107-109—Fiore, I. Nos. 372-427, and Code, Nos. 180-387—Martens, I. §§ 74 and 75—Westlake, Chapters, pp. 86-106.

§ 123. Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects. As excluding dependence from any other authority, and in especial from the authority of another State, sovereignty is independence. It is external independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is internal independence with regard to the liberty of action of a State inside its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is territorial supremacy. As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is personal supremacy.

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

¹ See Halleck, I. pp. 124-142, where the matter is treated with all details. See also below, § 257.

² See below, § 187.

For these reasons a State as an International Person possesses independence and territorial and personal supremacy. These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them. The distinction is apparent and useful, although internal independence is nothing else than sovereignty comprising territorial supremacy, but viewed from a different point of view.

Conse-
quences of
Indepen-
dence and
Territorial
and
Personal
Supre-
macy.

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States abstain themselves, and prevent their agents and subjects, from committing any act which contains a violation of its independence and its territorial as well as personal supremacy.

In consequence of its external independence, a State can manage its international affairs according to discretion, especially enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace.

In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make use of legislature as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under the latter's dominion and sway, and even foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier. Aliens

residing in a State can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of maintaining order and safety. But aliens may be expelled, or not received at all. On the other hand, hospitality may be granted to them whatever act they have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State. And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent.

In consequence of its personal supremacy, a State can treat its subjects according to discretion, and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad recognised by the home authorities, can punish them on their return for crimes they have committed abroad.

§ 125. The duty of every State itself to abstain and to prevent its agents and subjects from any act which contains a violation¹ of another State's independence or territorial and personal supremacy is correlative to the respective right of the other State. It is impossible to enumerate all such actions as might contain a violation of this duty. But it is of value to give some illustrative examples. Thus, in the interest of the independence of other States, a State is not allowed to interfere in the management of their international affairs nor to prevent them from doing or to compel them

Violations
of Inde-
pendence
and Terri-
torial and
Personal
Supre-
macy.

¹ See below, § 155.

to do certain acts in their international intercourse. Further, in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.¹

Again, in the interest of the personal supremacy of other States, a State is not allowed to naturalise aliens residing on its territory without their consent,² nor to prevent them from returning home for the purpose of fulfilling military service or from paying rates and taxes to their home State, nor to incite citizens of foreign States to emigration.

Restric-
tions upon
Indepen-
dence.

§ 126. Independence is not boundless liberty of a State to do what it likes without any restriction whatever. The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States because it is bound not to intervene in the affairs of other States. And it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions. Thus it is generally admitted that States under suzerainty or under protectorate are so much restricted that they are not fully independent, but half-Sovereign. And the same is the case with the member-States of a Federal State which are part-Sovereign. On the other hand, the

¹ But neighbouring States very often give such permission to one another. Switzerland, for instance, allows German Custom House officers to be stationed on two railway stations of Basle for the purpose of examining the luggage of travellers from Basle to Germany.

² See, however, below (§ 299), where the fact is stated that some States naturalise an alien through the very fact of his taking domicile on their territory.

restrictions connected with the neutralisation of States does not, according to the correct opinion,¹ destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action.

From a political and a legal point of view it is of great importance that the States imposing and those accepting restrictions upon independence should be clear in their intentions. For the question may arise whether these restrictions make the respective State a dependent one.

Thus through article 4 of the Convention of London of 1884 between Great Britain and the former South African Republic stipulating that the latter should not conclude any treaty with any foreign State, the Orange Free State excepted, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent State, although the Republic itself and many writers were of a different opinion.²

Thus, to give another example, through article 1 of the Treaty of Havana³ of May 22, 1903, between the United States of America and Cuba, stipulating that Cuba shall never enter into any such treaty with a foreign Power as will impair, or tend to impair, the independence of Cuba, and shall abstain from other acts, the Republic of Cuba is so much restricted that some writers maintain—wrongly, I believe—that Cuba is under an American protectorate and only a half-Sovereign State.

¹ See above, § 97.

² It is of interest to state the fact that, before the last phase of the conflict between Great Britain and the Republic, influential Continental writers stated the suzerainty of Great Britain over the Republic.

See Rivier, I. p. 89, and Holtzendorff in Holtzendorff, II. p. 115.

³ See Martens, N.R.G. 2nd Ser. XXXII. (1905), p. 79. As regards the international position of Cuba, see Whitcomb, "La situation internationale de Cuba" (1905).

Again, the Republic of Panama is, by the Treaty of Washington¹ of 1904, likewise burdened with some restrictions in favour of the United States, but here, too, it would be wrong to maintain that Panama is under an American protectorate.

Restric-
tions upon
Territorial
Supre-
macy.

§ 127. Just like independence, territorial supremacy does not give a boundless liberty of action. Thus, by customary International Law every State has a right to demand that its merchantmen can pass through the maritime belt of other States. Thus, further, navigation on so-called international rivers in Europe must be open to merchantmen of all States. Thus, thirdly, foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted extraterritoriality. Thus, fourthly, through the right of protection over citizens abroad which is held by every State according to customary International Law, a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve² in its army or navy. Thus, to give another and fifth example, a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory.³

In contradistinction to these restrictions by the customary Law of Nations, a State can through treaties

¹ See Martens, N.R.G. 2nd Ser. XXXI. (1905), p. 601.

² Great Britain would seem to uphold an exception to this rule, for Lord Reay, one of her delegates, declared—see “Deuxième Conférence Internationale de la Paix, Actes et Documents,” vol. III. p. 41—the following at the second Hague Peace Conference of 1907: “Nous reconnaissons qu’en règle générale le neutre

est exempt de tout service militaire dans l’État où il réside. Cependant dans les colonies britanniques et, dans une certaine mesure, dans tous les pays en voie de formation, la situation est tout autre et la population toute entière, sans distinction de nationalité, peut être appelée sous les armes pour défendre leurs foyers menacés.”

³ See below, § 178 a.

enter into obligations of many a kind without thereby losing its internal independence and territorial supremacy. Thus France by three consecutive treaties of peace—namely, that of Utrecht of 1713, that of Aix-la-Chapelle of 1748, and that of Paris of 1763—entered into the obligation to pull down and not to rebuild the fortifications of Dunkirk.¹ Napoleon I. imposed by the Peace Treaty of Tilsit of 1807 upon Prussia the restriction not to keep more than 42,000 men under arms. Again, article 29 of the Treaty of Berlin of 1878 imposed upon Montenegro the restriction not to possess a navy.² There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign Powers.

§ 128. Personal Supremacy does not give a boundless liberty of action either. (Although the citizens of a State remain under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy.) The duty to respect the territorial supremacy of a foreign State must prevent a State from doing all acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. Thus, for instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside.

Restric-
tions upon
Personal
Supre-
macy.

But a State may also by treaty obligation be for some parts restricted in the liberty of action with regard to its citizens. Thus articles 5, 25, 35, and 44 of the Treaty of Berlin of 1878 restrict the personal supremacy of Bulgaria, Montenegro, Servia, and Rou-

¹ This restriction was abolished by article 17 of the Treaty of Paris of 1783.

² It is doubtful whether this restriction is still in force; see below, § 258.

mania in so far as these States are thereby obliged not to impose any religious disabilities on any of their subjects.¹

V

SELF-PRESERVATION

Vattel, II. §§ 49-53—Hall, §§ 8, 83-86—Westlake, I. pp. 296-304—Phillimore, I. §§ 210-220—Twiss, I. §§ 106-112—Halleck, I. pp. 93-113—Taylor, §§ 401-409—Wheaton, §§ 61-62—Moore, II. §§ 215-219—Hartmann, § 15—Heffter, § 30—Holtzendorff in Holtzendorff, II. pp. 51-56—Gareis, § 25—Liszt, § 7—Ullmann, § 38—Bonfils, Nos. 242-252—Despagnet, Nos. 172-175—Mérignhac, I. pp. 239-245—Pradiere-Fodéré, I. Nos. 211-286—Rivier, I. § 20—Nys, II. pp. 178-181—Calvo, I. §§ 208-209—Fiore, I. Nos. 452-466—Martens, I. § 73—Westlake, Chapters, pp. 110-125.

Self-preservation
an excuse
for viola-
tions.

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States. Although, as a rule, all States have mutually to respect one another's Personality and are therefore bound not to violate one another, as an exception, certain violations of another State committed by a State for the purpose of self-preservation are not prohibited by the Law of Nations. Thus, self-preservation is a factor of great importance for the position of the States within the Family of Nations, and most writers maintain that every State has a fundamental right of self-preservation.² But nothing of the kind is actually the case, if the real facts of the law are taken into consideration. If every State really had a *right* of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although

¹ See above, § 73.

² This right was formerly frequently called *droit de convenance*, and was said to exist in the right of

every State to act in favour of its interests in case of a conflict between its own and the interests of another State. See Heffter, § 26.

self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But, nevertheless, they remain violations and can therefore be repulsed. Self-preservation is consequently an excuse, because violations of other States are in certain exceptional cases not prohibited when they are committed for the purpose and in the interest of self-preservation, although they need not patiently be suffered and endured by the States concerned.

§ 130. It is frequently maintained that every violation is excused so long as it was caused by the motive of self-preservation, but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of *necessity* only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting State would have to suffer or have to continue to suffer a violation against itself. (If an imminent violation or the continuation of an already commenced violation can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified.) When, to give an example, a State is informed that on neighbouring territory a body of armed men is being organised for the purpose of a raid into its own territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises and the threatened State is justified in invading

What acts
of self-
preserva-
tion are
excused.

the neighbouring country and disarming the intending raiders.

The reason of the thing, of course, makes it necessary for every State to judge for itself when it considers a case of necessity has arisen, and it is therefore impossible to lay down a hard-and-fast rule regarding the question when a State can or cannot have recourse to self-help which violates another State. Everything depends upon the circumstances and conditions of the special case, and it is therefore of value to give some historical examples.

Case of
the
Danish
Fleet
(1807).

§ 131. After the Peace of Tilsit of 1807 the British Government¹ was cognisant of the provision of some secret articles of this treaty that France should be at liberty to seize the Danish fleet and to make use of it against Great Britain. This plan, when carried out, would have endangered the position of Great Britain, which was then waging war against France. As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war. And at the same time the means of defence against French invasion and a guaranty of her whole possessions were offered to Denmark by England. The latter, however, refused to comply with the British demands, whereupon the British considered a case of necessity in self-preservation had arisen, shelled Copenhagen, and seized the Danish fleet.

Case of
Amelia
Island.

§ 132. "Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name

¹ I follow Hall's (§ 86) summary of the facts.

of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels."¹

§ 133. In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of an island in the river Niagara, on the territory of the United States, and with the help of American subjects equipped a boat called the *Caroline*, with the purpose of crossing into Canadian territory and bringing material help to the insurgents. The Canadian Government, timely informed of the imminent danger, sent a British force over into the American territory, which obtained possession of the *Caroline*, seized her arms, and then sent her adrift down the falls of the Niagara. The United States complained of this British violation of her territorial supremacy, but Great Britain was in a position to prove that her act was necessary in self-preservation, since there was not sufficient time to prevent the imminent invasion of her territory through application to the United States Government.²

Case of
the
Caroline.

¹ See Wharton, § 50 a, and Moore, II. § 216.

² See Wharton, I. § 50 c, Moore, II. § 217, and Hall, § 84. With the case of the *Caroline* is connected the case of *Macleod*, which will be discussed below, § 446. Hall (§ 86), Martens (I. § 73), and others quote also the case of the *Virginie* (1873) as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification of the capture of the

vessel (see Moore, II. § 309, pp. 895-903). That a vessel sailing under another State's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt. No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by capture of the vessel.

VI

INTERVENTION

Vattel, II. §§ 54-62—Hall, §§ 88-95—Westlake, I. pp. 304-308—Lawrence, §§ 62-70—Phillimore, I. §§ 390-415A—Halleck, I. pp. 94-109—Taylor, §§ 410-430—Walker, § 7—Wharton, I. §§ 45-72—Moore, VI. §§ 897-926—Wheaton, §§ 63-71—Bluntschli, §§ 474-480—Hartmann, § 17—Heffter, §§ 44-46—Geffcken in Holtzendorff, II. pp. 131-168—Gareis, § 26—Liszt, § 7—Ullmann, §§ 163-164—Bonfils, Nos. 295-323—Despagnet, Nos. 193-216—Mérignhac, I. pp. 284-310—Pradier-Fodéré, I. Nos. 354-441—Rivier, I. § 31—Nys, II. pp. 185-193, 200-205—Calvo, I. §§ 110-206—Fiore, I. Nos. 561-608, and Code, Nos. 543-557—Martens, I. § 76—Bernard, "On the Principle of non-Intervention" (1860)—Hautefeuille, "Le principe de non-intervention" (1863)—Stapleton, "Intervention and Non-intervention, or the Foreign Policy of Great Britain from 1790 to 1865" (1866)—Geffcken, "Das Recht der Intervention" (1887)—Kebedgy, "De l'intervention" (1890)—Floecker, "De l'intervention en droit international" (1896)—Drago, "Cobro coercitivo de deudas publicas" (1906)—Moulin, "La doctrine de Drago" (1908).

Concep-
tion and
character
of Inter-
vention.

§ 134. Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Such intervention can take place by right or without a right, but it always concerns the external independence or the territorial or personal supremacy of the respective State, and the whole matter is therefore of great importance for the position of the States within the Family of Nations. That intervention is, as a rule, forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt. On the other hand, there is just as little doubt¹ that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.

Intervention can take place in the external as well

¹ The so-called doctrine of non-intervention as defended by some Italian writers (see Fiore, I. No. 565),

who deny that intervention is ever justifiable, is a political doctrine without any legal basis whatever.

as in the internal affairs of a State. It concerns in the first case the external independence, and in the second either the territorial or the personal supremacy. But, it must be emphasised that intervention proper is always dictatorial interference, not interference pure and simple.¹ Therefore intervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a dictatorial interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations.² Intercession is the name for the interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State. And, lastly, co-operation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution. Thus, for example, Russia sent troops in 1849, at the request of Austria, into Hungary to assist Austria in suppressing the Hungarian revolt.

§ 135. It is apparent that such interventions as take place by right must be distinguished from others. Interven-
tion by
Right. Wherever there is no right of intervention, although it may be admissible and excused, an intervention violates either the external independence or the territorial or the personal supremacy. But if an intervention takes place by right, it never contains such a violation, because (the right of intervention is always based on a legal restriction) upon the independence or territorial or personal supremacy of the State concerned, and because

¹ Many writers constantly commit this confusion.

² See below, vol. II. § 9.

the latter is in duty bound to submit to the intervention. Now a State may have a right of intervention against another State, mainly for six reasons¹:

(1) A Suzerain State has a right to intervene in many affairs of the Vassal, and a State which holds a protectorate has a right to intervene in all the external affairs of the protected State.

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with that affair unilaterally. The events of 1878 provide an illustrative example. Russia had concluded the preliminary Peace of San Stefano with defeated Turkey; Great Britain protested because the conditions of this peace were inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters. Had Russia persisted in carrying out the preliminary peace, Great Britain as well as other signatory Powers of the Treaty of Paris and the Convention of London doubtless possessed a right of intervention.

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions concerned, the other party or parties have a right to intervene. Thus the United States of America, in 1906, exercised intervention in Cuba in conformity with article 3 of the Treaty of Havana² of 1903, which stipulates: "The Government of Cuba consents that the United States may exercise the right to intervene for

¹ The enumeration is not intended to be exhaustive.

² See Martens, N.R.G. 2nd Ser. XXXII. (1905), p. 79.—Even if no special right of intervention is stipulated, it nevertheless exists in such cases. Thus—see below, § 574—those Powers which have guaranteed the in-

tegrity of Norway under the condition that she does not cede any part of her territory to any foreign Power would have a right to intervene in case such a cession were contemplated, although the treaty concerned does not stipulate this.

the preservation of Cuban independence, the maintenance of a Government adequate for the protection of life, property, and individual liberty. . . .” And likewise the United States of America, in 1904, exercised intervention in Panama in conformity with article 7 of the Treaty of Washington¹ in 1903, which stipulates: “The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbours adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.”

(4) If a State in time of peace or war violates such rules of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other States have a right to intervene and to make the delinquent submit to the rules concerned. If, for instance, a State undertook to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle. Or if a State which is a party to the Hague Regulations concerning Land Warfare were to violate one of these Regulations, all the other signatory Powers would have a right to intervene.

(5) A State that has guaranteed by treaty the form of government of a State or the reign of a certain dynasty over the same has a right² to intervene in case of change of form of government or of dynasty, provided the respective treaty of guaranty was concluded between

¹ See Martens, N.R.G. 2nd Ser. XXXI. (1905), p. 599.

² But this is not generally recognised; see, for instance, Hall, § 93, who denies the existence of such a right. I do not see the reason why a State should not be able to undertake the obligation to retain

a certain form of government or dynasty. That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter.

the respective States and not between their monarchs personally.

(6) The right of protection¹ over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned.

The so-called *Drago*² doctrine, which asserts the rule that intervention is not allowed for the purpose of making a State pay its public debts, is unfounded, and has not received general recognition, although Argentina and some other South American States tried to establish this rule at the second Hague Peace Conference of 1907. But this Conference adopted, on the initiative of the United States of America, a "Convention³ respecting the Limitation of the Employment of Force for the Recovery of Contract Debts." According to article 1 of this Convention, the contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settlement of the *compromis* impossible, or, after the arbitration, fails to submit to the award.—It must be emphasised that the stipulations of this Convention concern the recovery of

¹ See below, § 319.

² The Drago doctrine originates from Louis M. Drago, sometime Foreign Secretary of the Republic of Argentina. See Drago, "Cobro coercitivo de deudas publicas" (1906); Barclay, "Problems of International Practice, &c." (1907), pp. 115-122; Moulin, "La Doctrine de Drago" (1908); Higgins, "The Hague Peace Conferences, &c."

(1909), pp. 184-197; Scott, "The Hague Peace Conferences" (1909), vol. I. pp. 415-422; Calvo in R.I. 2nd Ser. V. (1903), pp. 597-623; Drago in R.G. XIV. (1907), pp. 251-287; Moulin in R.G. XIV. (1907), pp. 417-472; Hershey in A.J. I. (1907), pp. 26-45; Drago in A.J. I. (1907), pp. 692-725.

³ See Scott in A.J. II. (1908), pp. 78-94.

all contract debts, whether or no they arise from public loans.

§ 136. In contradistinction to intervention by right, there are other interventions which must be considered admissible, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means any legal duty to submit patiently and suffer the intervention. Of such interventions in default of right there are two kinds generally admitted and excused—namely, such as are necessary in self-preservation and such as are necessary in the interest of the balance of power.

Admissi-
bility of
Interven-
tion in
default of
Right.

(1) As regards interventions for the purpose of self-preservation, it is obvious that, if any necessary violation committed in self-preservation of the International Personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is contained in an intervention. And it matters not whether such an intervention exercised in self-preservation is provoked by an actual or imminent intervention on the part of a third State, or by some other incident.

(2) As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. An equilibrium between the members of the Family of Nations is an indispensable¹ condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law. Since the Westphalian Peace of

¹ A survey of the opinions concerning the value of the principle of balance of power is given by Bulmerincq, "Praxis, Theorie und Codification des Völkerrechts" (1874), pp. 40–50, but Bulmerincq himself rejects the principle. See also Donnadien, "Essai sur la théorie de l'équilibre" (1900) where the matter is exhaustively treated, and Dupuis,

"Le principe d'équilibre et le concert européen" (1909), pp. 90–108, and 494–513. It is necessary to emphasise that the principle of the balance of power is not a legal principle and therefore not one of International Law, but one of International policy; it is a political principle indispensable to the existence of International Law in its present condition.

1648 the principle of balance of power has played a preponderant part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815 when the map of Europe was rearranged, at the Congress of Paris in 1856, the Conference of London in 1867, and the Congress of Berlin in 1878. The States themselves and the majority of writers agree upon the admissibility of intervention in the interest of balance of power. Most of the interventions exercised in the interest of the preservation of the Turkish Empire must, in so far as they are not based on treaty rights, be classified as interventions in the interest of balance of power. Examples of this are supplied by collective interventions exercised by the Powers in 1886 for the purpose of preventing the outbreak of war between Greece and Turkey, and in 1897 during the war between Greece and Turkey with regard to the island of Crete.

Interven-
tion in the
interest
of Hu-
manity.

§ 137. Many jurists maintain that intervention is likewise admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey, because public opinion was horrified at the cruelties committed during this struggle. And many a time interventions have taken place to stop the persecution of Christians in Turkey. But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that

interventions in the interests of humanity are admissible provided they are exercised in the form of a *collective* intervention of the Powers.¹

§ 138. Careful analysis of the rules of the Law of Nations regarding intervention and the hitherto exercised practice of intervention make it apparent that intervention is *de facto* a matter of policy just like war.—

Interven-
tion *de*
facto a
Matter of
Policy.

This is the result of the combination of several factors.

Since, even in the cases in which it is based on a right, intervention is not compulsory, but is solely in the discretion of the State concerned, it is for that reason alone a matter of policy. Since, secondly, every State must decide for itself whether vital interests of its own are at stake and whether a case of necessity in the interest of self-preservation has arisen, intervention is for this part again a matter of policy. Since, thirdly, the question of balance of power is so complicated and the historical development of the States involves gradually an alteration of the division of power between the States, it must likewise be left to the appreciation of every State whether or not it considers the balance of power endangered and, therefore, an intervention necessary. And who can undertake to lay down a hard-and-fast rule with regard to the amount of inhumanity on the part of a Government that would justify intervention according to the Law of Nations?

No State will ever intervene in the affairs of another if it has not some important interest in doing so, and it has always been easy for such State to find or pretend some legal justification for an intervention, be it self-preservation, balance of power, or humanity. There is no great danger to the welfare of the States in the fact that intervention is *de facto* a matter of policy. Too many interests are common to all the members of the

¹ See Hall, §§ 91 and 95, where the merits of the problem are discussed from all sides. See also

below, § 292, and Rougier in R.G. XVII. (1910), pp. 468-526.

Family of Nations, and too great is the natural jealousy between the Great Powers, for an abuse of intervention on the part of one powerful State without calling other States into the field. Since unjustified intervention violates the very principles of the Law of Nations, and since, as I have stated above (§ 135), in case of a violation of these principles on the part of a State every other State has a right to intervene, any unjustifiable intervention by one State in the affairs of another gives a right of intervention to all other States. Thus it becomes apparent here, as elsewhere, that the Law of Nations is intimately connected with the interests of all the States, and that they must themselves secure the maintenance and realisation of this law. This condition of things tends naturally to hamper more the ambitions of weaker States than those of the several Great Powers, but it seems unalterable.

The
Monroe
Doctrine.

§ 139. The *de facto* political character of the whole matter of intervention becomes clearly apparent through the so-called Monroe doctrine¹ of the United States of America. This doctrine, at its first appearance, was indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon. The Powers of this alliance were inclined to extend their policy of intervention to America and to assist Spain in regaining her hold over the former Spanish colonies in South America which had declared and maintained their independence, and which were recognised as independent Sovereign States by the United States of America. To meet and to check the

¹ Wharton, § 57; Dana's Note No. 36 to Wharton, p. 36; Tucker, "The Monroe Doctrine" (1885); Moore, "The Monroe Doctrine" (1895), and Digest, VI. §§ 927-968; Cespèdes, "La doctrine de Monroe" (1893); Mérignac, "La doctrine de Monroe

à la fin du XIX^e siècle" (1896); Beaumarchais, "La doctrine de Monroe" (1898); Redaway, "The Monroe Doctrine" (1898); Pékin, "Les États-Unis et la doctrine de Monroe" (1900).

imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823. This Message contains two quite different, but nevertheless equally important, declarations.

(1) In connection with the unsettled boundary lines in the north-west of the American continent, the Message declared "that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth (not to be considered as subjects for future colonisation) by any European Power." This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it. In fact, however, no occupation of American territory has since then taken place on the part of a European State.

(2) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that the United States had not intervened, and never would intervene, in wars in Europe, but could not, on the other hand, in the interest of her own peace and happiness, allow the allied European Powers (to extend their political system to any part of America) and try to intervene in the independence of the South American republics.

(3) Since the time of President Monroe, the Monroe doctrine has been gradually somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent. Whenever a conflict occurs between such an American State and a European Power, the United States is ready to exercise intervention. Through the civil war her hands were to a certain extent bound in the sixties of the last century, and she could not prevent the occupation of Mexico by the French army, but she intervened¹ in 1865. Again, she did not intervene in 1902

¹ See Moore, VI. § 957.

when Great Britain, Germany, and Italy took combined action against Venezuela, because she was cognisant of the fact that this action intended merely to make Venezuela comply with her international duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela when Lord Salisbury had sent an *ultimatum* to Venezuela, and she retains the Monroe doctrine as a matter of principle.

Merits of
the
Monroe
Doctrine.

§ 140. The importance of the Monroe doctrine is of a political, not of a legal character. Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States. The European States are, as far as the Law of Nations is concerned, absolutely free to acquire territory in America as elsewhere. And the same legal rules are valid concerning intervention on the part of European Powers both in American affairs and in affairs of other States. But it is evident that the Monroe doctrine, as the guiding star of the policy of the United States, is of the greatest *political* importance. And it ought not to be maintained that this policy is in any way inconsistent with the Law of Nations. In the interest of balance of power in the world, the United States considers it a necessity that European Powers should not acquire more territory on the American continent than they actually possess. She considers, further, her own welfare so intimately connected with that of the other American States that she thinks it necessary, in the interest of self-preservation, to watch closely the relations of these States with Europe and also the relations between these very States, and eventually to intervene in conflicts. Since every State must decide for itself whether and where vital interests of its own are at stake and whether the balance of power is endangered to its

disadvantage, and since, as explained above (§ 138), intervention is therefore *de facto* a matter of policy, there is no legal impediment to the United States carrying out a policy in conformity with the Monroe doctrine. This policy hampers indeed the South American States, but with their growing strength it will gradually disappear. For, whenever some of these States become Great Powers themselves, they will no longer submit to the political hegemony of the United States, and the Monroe doctrine will have played its part.

VII

INTERCOURSE

Grotius, II. c. 2, § 13—Vattel, II. §§ 21-26—Hall, § 13—Taylor, § 160—Bluntschli, § 381 and p. 26—Hartmann, § 15—Heffter, §§ 26 and 33—Holtzendorff in Holtzendorff, II. pp. 60-64—Gareis, § 27—Liszt, § 7—Ullmann, § 38—Bonfils, Nos. 285-289—Despagnet, No. 183—Mérignhac, I. pp. 256-257—Pradier-Fodéré, I. No. 184—Rivier, I. pp. 262-264—Nys, II. pp. 221-228—Calvo, III. §§ 1303-1305—Fiore, I. No. 370—Martens, I. § 79.

§ 141. Many adherents of the doctrine of fundamental rights include therein also a right of intercourse of every State with all others. This right of intercourse is said to contain a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right of foreigners to travel and reside on the territory of every State, and the like. But if the real facts of international life are taken into consideration, it becomes at once apparent that such a fundamental right of intercourse does not exist. All the consequences which are said to follow from the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist. The civilised States make a community of States because

Inter-
course a
presuppo-
sition of
Inter-
national
Person-
ality.

they are knit together through their common interests and the manifold intercourse which serves these interests. Through intercourse with one another and with the growth of their common interests the Law of Nations has grown up among the civilised States. Where there is no intercourse there cannot be a community and a law for such community. A State cannot be a member of the Family of Nations and an International Person, if it has no intercourse whatever with at least one or more other States. Varied intercourse with other States is a necessity for every civilised State. The mere fact that a State is a member of the Family of Nations shows that it has various intercourse with other States, for otherwise it would never have become a member of that family. Intercourse is therefore one of the characteristics of the position of the States within the Family of Nations, and it may be maintained that intercourse is a presupposition of the international Personality of every State. But no special right or rights of intercourse between the States exist according to the Law of Nations. (It is because such special rights of intercourse do not exist that the States conclude special treaties regarding matters of post, telegraphs, telephones, railways, and commerce.) On the other hand, most States keep up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture. And although as a rule they allow¹ aliens to travel and to reside on their territory, they can expel every foreign subject according to discretion.

Conse-
quences of
Inter-
course as
a Presup-
position of

§ 142. Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in every way. The whole institution of legation serves the interest of intercourse between the States,

¹ That an alien has no right to demand to be admitted to British territory was decided in the case of

Musgrove v. Chun Teeong Toy, L.R. (1891), App. Cas. 272.

as does the consular institution. The right of legation,¹ which every full-Sovereign State undoubtedly holds, is held in the interest of intercourse, as is certainly the right of protection over citizens abroad² which every State possesses. The freedom of the Open Sea,³ which has been universally recognised since the end of the first quarter of the nineteenth century, the right of every State to the passage of its merchantmen through the maritime belt⁴ of all other States, and, further, freedom of navigation for the merchantmen of all nations on so-called international rivers,⁵ are further examples of provisions of the Law of Nations in the interest of international intercourse.

Inter-
national
Person-
ality.

The question is frequently discussed and answered in the affirmative whether a State has the right to require such States as are outside the Family of Nations to open their ports and allow commercial intercourse. Since the Law of Nations is a law between those States only which are members of the Family of Nations, it has certainly nothing to do with this question, which is therefore one of mere commercial policy and of morality.

VIII

JURISDICTION

Hall, §§ 62, 75-80—Westlake, I. pp. 236-271—Lawrence, §§ 93-109—Phillimore, I. §§ 317-356—Twiss, I. §§ 157-171—Halleck, I. pp. 186-245—Taylor, §§ 169-171—Wheaton, §§ 77-151—Moore, II. §§ 175-249—Bluntschli, §§ 388-393—Heffter, §§ 34-39—Bonfil, Nos. 263-266—Rivier, I. § 28—Nys, II. pp. 257-263—Fiore, I. Nos. 475-588.

§ 143. Jurisdiction is for several reasons a matter of importance as regards the position of the States within the Family of Nations. States possessing inde-

Jurisdic-
tion im-
portant for
the posi-
tion of the

¹ See below, § 360.

² See below, § 319. The right of protection over citizens abroad is frequently said to be a special right of self-preservation, but it

is really a right in the interest of intercourse.

³ See below, § 259.

⁴ See below, § 188.

⁵ See below, § 178.

States
within the
Family of
Nations.

pendence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the exercise of this natural power in the interest of one another. Since intercourse of all kinds takes place between the States and their subjects, the matter ought to be thoroughly regulated by the Law of Nations. But such regulation has as yet only partially grown up. The consequence of both the regulation and non-regulation of jurisdiction is that concurrent jurisdiction of several States can often at the same time be exercised over the same persons and matters. And it can also happen that matters fall under no jurisdiction because the several States which could extend their jurisdiction over these matters refuse to do so, leaving them to each other's jurisdiction.

Restric-
tions upon
Territorial
Jurisdic-
tion.

§ 144. As all persons and things within the territory of a State fall under its territorial supremacy, every State has jurisdiction over them. The Law of Nations, however, gives a right to every State to claim so-called extritoriality and therefore exemption from local jurisdiction chiefly for its head,¹ its diplomatic envoys,² its men-of-war,³ and its armed forces⁴ abroad. And partly by custom and partly by treaty obligations, Eastern non-Christian States, Japan now excepted, are restricted⁵ in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers.

Jurisdic-
tion over
Citizens
abroad.

§ 145. The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy. (As every State can also exercise

¹ Details below, §§ 348–353, and 356.—The exemption of a State itself from the jurisdiction of another is not based upon a claim to extritoriality, but upon the claim to equality; see above, § 115.

² Details below, §§ 385–405.

³ Details below, §§ 450–451.

⁴ Details below, § 445.

⁵ Details below, §§ 318 and 440.

jurisdiction over aliens¹ within its boundaries, such aliens are often under two concurrent jurisdictions. And, since a State is not obliged to exercise jurisdiction for all matters over aliens on its territory, and since the home State is not obliged to exercise jurisdiction over its subjects abroad, it may and does happen that aliens are actually for some matters under no State's jurisdiction.

§ 146. As the Open Sea is not under the sway of any State, no State can exercise its jurisdiction there. But it is a rule of the Law of Nations that the vessels and the things and persons thereon remain during the time they are on the Open Sea under the jurisdiction of the State under whose flag they sail.² It is another rule of the Law of Nations that piracy³ on the Open Sea can be punished by any State, whether or no the pirate sails under the flag of a State. Further,⁴ a general practice seems to admit the claim of every maritime State to exercise jurisdiction over cases of collision at sea, whether the vessels concerned are or are not sailing under its flag. Again, in the interest of the safety of the Open Sea, every State has the right to order its men-of-war to ask any suspicious merchantman they meet on the Open Sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the Open Sea and to arrest there such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt.⁵ Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the Open Sea all neutral vessels for carrying contraband, breach of blockade, or unneutral services to the enemy.

§ 147. Many States claim jurisdiction and threaten

¹ See below, § 317.

² See below, § 260.

³ See below, § 278.

⁴ See below, § 265.

⁵ See below, §§ 265-266.

Jurisdiction on the Open Sea.

Criminal Jurisdiction.

tion over
Foreigners
in Foreign
States.

punishment for certain acts committed by a foreigner in foreign countries.¹ States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder or arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment. The question is, therefore, whether States have a right to jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these States. The question must be answered in the negative. For at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the Courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.² In the

¹ See Hall, § 62; Westlake, I. pp. 251-253; Lawrence, § 104; Taylor, § 191; Moore, II. §§ 200 and 201; Phillimore, I. § 334.

² The Institute of International

Law has studied the question at several meetings and in 1883, at its meeting at Munich (see *Annuaire*, VII. p. 156), among a body of fifteen articles concerning the conflict of the

only ¹ case which is reported—namely, in the case of Cutting—an intervention took place according to this view. In 1886, one A. K. Cutting, a subject of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas. Mexico maintained that she had a right to punish Cutting, because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico. The United States, however, intervened,² and demanded Cutting's release. Mexico refused to comply with this demand, but nevertheless Cutting was finally released, as the plaintiff withdrew his action for libel. Since Mexico likewise refused to comply with the demand of the United States to alter her Criminal Law for the purpose of avoiding in the future a similar incident, diplomatic practice has not at all settled the subject.

Criminal Laws of different States, adopted the following (article 8):—
 "Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are not provided against by the Criminal Law of the territory where they take place." But it must be emphasised that this resolution has value *de lege ferenda* only.

¹ The case of Cirilo Pouble—see Moore, II. § 200, pp. 227–228—concerning which the United States at first were inclined to intervene,

proved to be a case of a crime committed within Spanish jurisdiction. The case of John Anderson—see Moore, I. § 174, p. 933—is likewise not relevant, as he claimed to be a British subject.

² See Westlake, I. p. 252; Taylor, § 192; Calvo, VI. §§ 171–173; Moore, II. § 201, and "Report on Extraterritorial Crime and the Cutting Case" (1887); Rolin in R.I. XX. (1888), pp. 559–577. The case is fully discussed and the American claim is disputed by Mendelssohn Bartholdy, "Das räumliche Herrschaftsgebiet des Strafgesetzes" (1908), pp. 135–143.

CHAPTER III

RESPONSIBILITY OF STATES

I

ON STATE RESPONSIBILITY IN GENERAL

Grotius, II. c. 21, § 2—Pufendorf, VIII. c. 6, § 12—Vattel, II. §§ 63-78—Hall, § 65—Halleck, I. pp. 440-444—Wharton, I. § 21—Moore, VI. §§ 979-1039—Wheaton, § 32—Bluntschli, § 74—Heffter, §§ 101-104—Holtzendorff in Holtzendorff, II. pp. 70-74—Liszt, § 24—Ullmann, § 39—Bonfils, Nos. 324-332—Despagnet, No. 466—Piedelièvre, I. pp. 317-322—Pradier-Fodéré, I. Nos. 196-210—Rivier, I. pp. 40-44—Calvo, III. §§ 1261-1298—Fiore, I. Nos. 659-679, and Code, Nos. 591-610—Martens, I. § 118—Clunet, "Offenses et actes hostiles commis par particuliers contre un état étranger" (1887)—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 324-381—Anzillotti, "Teoria generale della responsabilità dello stato nel diritto internazionale" (1902)—Wiese, "Le droit international appliqué aux guerres civiles" (1898), pp. 43-65—Rougier, "Les guerres civiles et le droit des gens" (1903), pp. 448-474—Baty, "International Law" (1908), pp. 91-242—Anzillotti in R.G. XIII. (1906), pp. 5-29 and 285-309—Foster in A.J. I. (1907), pp. 5-10—Bar in R.I. 2nd Ser. I. (1899), pp. 464-481.

Nature of
State
Responsi-
bility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects. Since a State can abolish parts of its Municipal Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law. Different from this internal autocracy is the external responsibility of a State to fulfil its international legal duties. Responsibility for such duties is, as will be remembered,¹ a quality of every State as an International Person, without which the Family of Nations could not peaceably exist. Although there is no International

¹ See above, § 113.

Court of Justice which could establish such responsibility and pronounce a fine or other punishment against a State for neglect of its international duties, State responsibility concerning international duties is nevertheless a *legal* responsibility. For a State cannot abolish or create new International Law in the same way as it can abolish or create new Municipal Law. A State, therefore, cannot renounce its international duties unilaterally¹ at discretion, but is and remains legally bound by them. And although there is not and never will be a central authority above the single States to enforce the fulfilment of these duties, there is the legalised self-help of the single States against one another. For every neglect of an international legal duty constitutes an international delinquency,² and the violated State can through reprisals or even war compel the delinquent State to comply with its international duties. It is only theorists who deny the possibility of a legal responsibility of States, the practice of the States themselves recognises it distinctly, although there may in a special case be controversy as to whether a responsibility is to be borne. And State responsibility is now in a general way recognised for the time of war by article 3 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, which stipulates: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

§ 149. Now if we examine the various international duties out of which responsibility of a State may rise,

Original
and

¹ See Annex to Protocol I. of Conference of London, 1871, where the Signatory Powers proclaim that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements

of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."

² See below, § 151.

Vicarious
State
Responsi-
bility.

we find that there is a necessity for two different kinds of State responsibility to be distinguished. They may be named "original," in contradistinction to "vicarious" responsibility. I name as "original" the responsibility borne by a State for its own—that is, its Government's actions, and for such actions of the lower agents or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their agents, of their subjects, and even of such aliens as are for the time living within their territory. This responsibility of States for acts other than their own I name "vicarious" responsibility. Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects¹ of International Law, and the latter is unable to confer directly rights and duties upon individuals. And for this reason the Law of Nations must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such aliens as are temporarily resident on its territory.²

Essential
Difference
between
Original
and
Vicarious
Responsi-
bility.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties by a State constitutes an international delinquency. The responsibility which a State bears for such delinquency is especially grave, and

¹ See below, § 290.

² The distinction between original and vicarious responsibility was first made, in 1905, in the first edition of this treatise and ought therefore to have been discussed by Anzillotti in

his able article in R.G. XIII. (1906), p. 292. The fact that he does not appreciate this distinction is prejudicial to the results of his researches concerning the responsibility of States.

requires, apart from other especial consequences, a formal expiatory act; such as an apology at least, by the delinquent State to repair the wrong done. On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrongdoers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

II

STATE RESPONSIBILITY FOR INTERNATIONAL DELINQUENCIES

See the literature quoted above at the commencement of § 148.

§ 151. International delinquency is every injury to another State committed by the head and the Government of a State through violation of an international legal duty. Equivalent to acts of the head and Government are acts of officials or other individuals commanded or authorised by the head or Government.

Concep-
tion of
Inter-
national
Delin-
quencies.

An international delinquency is not a crime, because the delinquent State, as a Sovereign, cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done.

International delinquencies in the technical sense of the term must not be confounded either with so-called "Crimes against the Law of Nations" or with so-called "International Crimes." "Crimes against the Law of

Nations” in the wording of many Criminal Codes of the single States are such acts of individuals against foreign States as are rendered criminal by these Codes. Of these acts, the gravest are those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. “International Crimes,” on the other hand, refer to crimes like piracy on the high seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confounded with discourteous and unfriendly acts. Although such acts may be met by retorsion, they are not illegal and therefore not delinquent acts.

Subjects
of Inter-
national
Delin-
quencies.

§ 152. An international delinquency may be committed by every member of the Family of Nations, be such member a full-Sovereign, half-Sovereign, or part-Sovereign State. Yet, half- and part-Sovereign States can commit international delinquencies in so far only as they have a footing within the Family of Nations, and therefore international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full-Sovereign State (suzerain, federal, or protectorate-exercising State) to which the delinquent State is attached that must bear a vicarious responsibility for the delinquency. On the other hand, so-called Colonial States without any footing whatever within the Family of Nations and, further, the member-States of the American Federal States, which likewise lack any footing whatever within the Family of Nations because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency. Thus an injurious act against

France committed by the Government of the Commonwealth of Australia or by the Government of the State of California in the United States of America, would not be an international delinquency in the technical sense of the term, but merely an internationally injurious act for which Great Britain or the United States of America must bear a vicarious responsibility. An instance of this is to be found in the conflict¹ which arose in 1906 between Japan and the United States of America on account of the segregation of Japanese children by the Board of Education of San Francisco and the demand of Japan that this measure should be withdrawn. The Government of the United States at once took the side of Japan, and endeavoured to induce California to comply with the Japanese demands.

§ 153. Since States are juristic persons, the question arises, Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? It is obvious that acts of this kind are, first, all such acts as are performed by the heads of States or by the members of Government acting in that capacity, so that their acts appear as State acts. Acts of such kind are, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments. On the other hand, unauthorised acts of corporations, such as Municipalities, or of officials, such as magistrates or even ambassadors, or of private individuals, never constitute an international delinquency. And, further, all acts committed by heads of States and members of Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies either.² The States concerned must certainly bear a vicarious responsibility for all such acts,

State
Organs
able to
commit
Inter-
national
Delin-
quencies.

¹ See Hyde in "The Green Bag," in R.G. XIV. (1907), pp. 636-685.
XIX. (1907), pp. 38-49; Root in A.J.
I. (1907), pp. 273-286; Barthélemy

² See below §§ 157-158.

but for that very reason these acts do not comprise international delinquencies.

No Inter-
national
Delin-
quency
without
Malice or
culpable
Negli-
gence.

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence. Therefore, an act of a State committed by right or prompted by self-preservation in necessary self-defence does not contain an international delinquency, however injurious it may actually be to another State. And the same is valid in regard to acts of officials or other individuals committed by command or with the authorisation of a Government.

Objects of
Inter-
national
Delin-
quencies.

§ 155. International delinquencies may be committed against so many different objects that it is impossible to enumerate them. It suffices to give some striking examples. [Thus a State may be injured—in regard to its independence through an unjustified intervention ; in regard to its territorial supremacy through a violation of its frontier ; in regard to its dignity through disrespectful treatment of its head or its diplomatic envoys ; in regard to its personal supremacy through forcible naturalisation of its citizens abroad ; in regard to its treaty rights through an act violating a treaty ; in regard to its right of protection over citizens abroad through any act that violates the body, the honour, or the property¹ of one of its citizens abroad. A State may also suffer various injuries in time of war by illegitimate acts of warfare, or by a violation of neutrality on the part of a neutral State in favour of the other belligerent. And a neutral may in time of war be injured in various ways through a belligerent violating neutrality by acts of warfare within the

¹ That a State which does not pay its public debts due to foreigners and refuses, on the demand of the home State of the foreigners concerned, to make satisfactory arrangements commits international delinquency there

is no doubt. On the so-called Drago doctrine and the Hague Convention concerning the Employment of Force for the Recovery of Contract Debts, see above, § 135, No. 6.

neutral State's territory ; for instance, through a belligerent man-of-war attacking an enemy vessel in a neutral port or in neutral territorial waters, or through a belligerent violating neutrality by acts of warfare committed on the Open Sea against neutral vessels.]

§ 156. The nature of the Law of Nations as a law between, not above, Sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create a reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so different that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises [a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done.] What kind of acts these are depends upon the special case and the discretion of the wronged State. It is obvious that there must be a pecuniary reparation for a material damage. Thus, according to article 3 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, a belligerent party which violates these laws shall, if the case demands, be liable to make compensation. But at least a formal apology on the part of the delinquent will in every case be necessary. This apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the mission of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international

Legal consequences of International Delinquencies.

delinquencies deliberately and maliciously committed, on the one hand, and, on the other, for such as arise merely from culpable negligence.

When the delinquent State refuses reparation of the wrong done, the wronged State can exercise such means as are necessary to enforce an adequate reparation. In case of international delinquencies committed in time of peace, such means are reprisals¹ (including embargo and pacific blockade) and war as the case may require. On the other hand, in case of international delinquencies committed in time of war through illegitimate acts of warfare on the part of a belligerent, such means are reprisals and the taking of hostages.²

III

STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

See the literature quoted above at the commencement of § 148, and especially Moore, VI. §§ 998–1018.

Responsi-
bility
varies
with
Organs
con-
cerned.

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the agents concerned. It is therefore necessary to distinguish between internationally injurious acts of heads of States, members of Government, diplomatic envoys, parliaments, judicial functionaries, administrative officials, and military and naval forces.

Inter-
nationally
injurious
Acts of
Heads of
States.

§ 158. Such international injurious acts as are committed by heads of States in the exercise of their official functions are not our concern here, because they constitute international delinquencies which have been discussed above (§§ 151–156). But a monarch can, just

¹ See below, vol. II. § 34.

² See below, vol. II. §§ 248 and 259.

as any other individual, in his private life commit many internationally injurious acts, and the question is, whether and in what degree a State must bear responsibility for such acts of its head. The position of a head of a State, who is within and without his State neither under the jurisdiction of a Court of Justice nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to claim a certain vicarious responsibility from States for internationally injurious acts committed by their heads in private life. Thus, for instance, when a monarch during his stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity, and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of heads of States, and are, therefore, [under the jurisdiction of the ordinary Courts of Justice,] there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Inter-
nationally
injurious
Acts of
Members
of Govern-
ment.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of extritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State,

Inter-
nationally
injurious
Acts of
Diplo-
matic
Envoys.

and, on the other hand, excludes the jurisdiction of the receiving State over such acts. [The Law of Nations therefore makes the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects in whose territory he resides.] But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise or express its regret for his behaviour, or to pay damages. It must, however, be remembered that such injurious acts as an envoy performs at the command or with the authorisation of the home State, constitute international delinquencies for which the home State bears original responsibility and for which the envoy cannot personally be blamed.

Inter-
nationally
injurious
Attitudes
of Parlia-
ments.

§ 161. As regards internationally injurious attitudes of parliaments, it must be kept in mind that, most important as may be the part parliaments play in the political life of a nation, they do not belong to the agents which represent the States in their international relations with other States. Therefore, however injurious to a foreign State [an attitude of a parliament may be, it can never constitute an international delinquency.] That, on the other hand, all States must bear vicarious responsibility for such attitudes of their parliaments, there can be no doubt. But, although the position of a Government is difficult in such cases, especially in States that have a representative Government, this does not concern the wronged State, which has a right to demand satisfaction and reparation for the wrong done.

Inter-
nationally

§ 162. Internationally injurious acts committed by

Judicial functionaries in their private life are in no way different from such acts committed by other individuals] But these functionaries may in their official capacity commit such acts, and the question is how far a State's vicarious responsibility for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are to a great extent independent of their Government.¹ Undoubtedly, in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion against such Courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. But if a Court observes its own proper forms of justice and nevertheless makes a materially unjust order or pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, unless the other party consents to bring the case before a Court of Arbitration.

injurious
Acts of
Judicial
Functionaries.

An illustrative case is that of the *Costa Rica Packet*,² which happened in 1891. Carpenter, the master of this Australian whaling-ship, was, by order of a Court of Justice, arrested on November 2, 1891, in the port of Ternate, in the Dutch East Indies, for having committed three years previously a theft on the sea within Dutch territorial waters. He was, however, released on November 28, because the Court found that the alleged crime was not committed within Dutch territorial waters, but on the High Seas. Great Britain demanded damages for the arrest of the master of the *Costa Rica Packet*, but Holland maintained that,

¹ Wharton, II. § 230, comprises abundant and instructive material on this question.

² See Bles in R.I. XXVIII. (1896), pp. 452-468; Regelsperger in R.G. IV.

(1897), pp. 735-745; Valery in R.G. V. (1898), pp. 57-66; Moore, I. § 148. See also Ullmann, "De la responsabilité de l'état en matière judiciaire" (1911).

since the judicial authorities concerned had ordered the arrest of Carpenter in strict conformity with the Dutch laws, the British claim was unjustified. After some correspondence, extending over several years, Great Britain and Holland agreed, in 1895, upon having the conflict settled by arbitration and upon appointing the late Professor de Martens of St. Petersburg as arbitrator. The award, given in 1899, was in favour of Great Britain, and Holland was condemned to pay damages to the master, the proprietors, and the crew of the *Costa Rica Packet*.¹

Inter-
nationally
injurious
Acts of
adminis-
trative
Officials
and Mili-
tary and
Naval
Forces.

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies because they are not State acts. But a State bears a wide, unlimited, and unrestricted vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the respective State.² Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid where required; and, lastly, the offenders must be punished according to the merits of the special case.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts of these subjects are

¹ The whole correspondence on the subject and the award are printed in Martens, N.R.G. 2nd Ser. XXIII. (1898), pp. 48, 715, and 808.

² It is of importance to quote again here art. 3 of the Hague Conven-

tion of 1907, concerning the Laws and Customs of War on Land, which stipulates that a State is responsible for all acts committed by its armed forces.

internationally injurious as would constitute international delinquencies when committed by the State itself or with its authorisation. Three very instructive cases may be quoted as illustrative examples :

(1) On September 26, 1887, a German soldier on sentry duty at the frontier near Vexaincourt shot from the German side and killed an individual who was on French territory. As this act of the sentry violated French territorial supremacy, Germany disowned and apologised for it and paid a sum of 50,000 francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood.

(2) On November 26, 1906, Hasmann, a member of the crew of the German gunboat *Panther*,¹ at that time in the port of Itajahi in Brazil, failed to return on board his ship. The commander of the *Panther* sent a searching party, comprising three officers in plain clothes and a dozen non-commissioned officers and soldiers in uniform, on shore for the purpose of finding the whereabouts of Hasmann. This party, during the following night, penetrated into several houses, and compelled some of the residents to assist them in their search for the missing Hasmann, who, however, could not be found. He voluntarily returned on board the following morning. As this act violated Brazilian territorial supremacy, Brazil lodged a complaint with Germany, which, after an inquiry, disowned the act of the commander of the *Panther*, formally apologised for it, and punished the commander of the *Panther* by relieving him of his command.²

(3) On July 15, 1911, while the Spanish were in occu-

¹ See R.G. XIII. (1906), pp. 200-206.

² Another example occurred in 1904, when the Russian Baltic Fleet,

on its way to the Far East during the Russo-Japanese war, fired upon the Hull Fishing Fleet off the Dogger Bank; see below, vol. II. § 5.

pation of Alcazar in Morocco, M. Boisset, the French Consular Agent, who was riding back to Alcazar from Suk el Arba with his native servants, was stopped at the gate of the town by a Spanish sentinel. The sentinel refused to allow him to enter unless he and his servants first delivered up their arms. As M. Boisset refused, the sentinel barred the way with his fixed bayonet and called out the guard. M. Boisset's horse reared, and the sentinel thereupon covered him with his rifle. After parleying to no purpose with the guard, to whom he explained who he was, the French Consular Agent was conducted by an armed escort of Spanish soldiers to the Spanish barracks. A native rabble followed upon the heels of the procession and cried out: "The French Consular Agent is being arrested by the Spaniards." Upon arriving at the barracks M. Boisset had an interview with a Spanish officer, who, without in any way expressing regret, merely observed that there had been a misunderstanding (*equivocacione*), and allowed the French Consular Agent to go his way. It is obvious that, as Consuls in Eastern non-Christian countries, Japan now excepted, are extraterritorial and inviolable, the arrest of M. Boisset was a great injury to France, which lodged a complaint with Spain. As promptly as July 19 the Spanish Government tendered a formal apology to France, and instructed the Spanish Commander at Alcazar to tender a formal apology to M. Boisset.

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to request that they should be otherwise treated than as the law of the land authorises a State to treat

its own subjects.¹ Therefore, since the Law of Nations does not prevent a State from expelling aliens, the home State of an expelled alien cannot request the expelling State to pay damages for the losses sustained by the expelled through his having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection,² riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS

See the literature quoted above at the commencement of § 148, and especially Moore, VI. §§ 1019-1031.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confound the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is practically impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility

Vicarious
in contra-
distinction
to original
State Re-
sponsi-
bility for
Acts of
Private
Persons.

¹ Provided, however, such law does not violate essential principles of justice. See below, § 320.
² See below, § 167.

for such injurious acts of private individuals as are incapable of prevention.

Vicarious
responsi-
bility for
Acts of
Private
Persons
relative
only.

§ 165. Now, whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For [their sole duty is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages where required.] Beyond this limit a State is not responsible for acts of private persons; there is in especial no duty of a State itself to pay damages for such acts if the offenders are not able to do it.

Municipal
Law for
Offences
against
Foreign
States.

§ 166. It is a consequence of the vicarious responsibility of States for acts of private persons that by the Criminal Law of every civilised State punishment is severe for certain offences of private persons against foreign States, such as violation of ambassadors' privileges, libel on heads of foreign States and on foreign envoys, and other injurious acts.¹ (In every case that arises the offender must be prosecuted and the law enforced by the Courts of Justice.) And it is further a consequence of the vicarious responsibility of States for acts of private persons that criminal offences of private persons against foreign subjects—such offences are indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad—must be punished according to the ordinary law of the land, and that the Civil Courts of Justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land.

Responsi-
bility for

§ 167. The vicarious responsibility of States for acts of insurgents and rioters is the same as for acts of other

¹ As regards the Criminal Law of England concerning such acts, see Stephen's Digest, articles 96–103.

private individuals. As soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States must be punished according to the law of the land. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign States against the local State for damages for losses sustained by their subjects through acts of the insurgents or rioters respectively, and that some writers¹ assert that such claims are justified by the Law of Nations. The majority of writers maintain, correctly, I think, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots just as the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals, and claim damages from the latter before the Courts of Justice. (The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its Courts must be accessible to the latter) for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States which, as France for instance, have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such kind. But the State itself never has by International Law a duty to pay such damages.

Acts of
Insurgents
and
Rioters.

The practice of the States agrees with this rule laid down by the majority of writers. Although in some

¹ See, for instance, Rivier, II. p. 43; Bruss in *Annuaire* XVII. pp. 96 -137; Bar in R.I. 2nd Ser. I. (1899), pp. 464-481.

cases several States have paid damages for losses of such kind, they have done it, not through compulsion of law, but for political reasons. In most cases in which the damages have been claimed for such losses, the respective States have refused to comply with the request.¹ As such claims have during the second half of the nineteenth century frequently been tendered against American States which have repeatedly been the scene of insurrections, several of these States have in commercial and similar treaties which they concluded with other States expressly stipulated² that they are not responsible for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.

The Institute of International Law has studied the matter and has proposed³ the following *Règlement* concerning it :—

(1) Independently of the case in which indemnities are due to foreigners by virtue of the general laws of the country, foreigners have a right to compensation when they are injured as to their person or as to their property in the course of a riot, of an insurrection, or of a civil war :

(a) When the act from which they have suffered is directed against foreigners as such in general, or against them as under the jurisdiction of a certain State, or

(b) When the act from which they have suffered consists in closing a port without due and proper previous notification, or in retaining foreign ships in a port, or

(c) When the injury is the result of an act contrary to the laws committed by a government official, or

(d) When the obligation to compensate is established by virtue of the general principles of the law of war.

(2) The obligation is equally well established when the injury has been committed (No. 1, *a* and *d*) on the territory of an insurrectionary government, whether by this government itself, or by one of its functionaries.

On the other hand, certain demands for indemnity may be

¹ See the cases in Calvo, III. §§ 1283–1290.

² See Martens, N.R.G. IX. p. 474 (Germany and Mexico); XV. p. 840 (France and Mexico); XIX. p. 831

(Germany and Colombia); XXII. p. 308 (Italy and Colombia); and p. 507 (Italy and Paraguay).

³ At its meeting at Neuchâtel in 1900; see *Annuaire*, XVIII. p. 254.

set aside when they concern facts which occur after the government of the State to which the injured person belongs has recognised the insurrectionary government as a belligerent Power, and when the injured person has continued to keep his domicile or his habitation on the territory of the insurrectionary government.

As long as the latter is considered by the government of the person alleged to be injured as a belligerent Power, the demand may only be addressed, in the case of paragraph 1 of article 2, to the insurrectionary government and not to the legitimate government.

(3) The obligation to compensate disappears when the injured persons are themselves a cause of the event which has brought the injury.¹ Notably no obligation exists to indemnify those who have returned to the country or who wish to give themselves up to commerce or industry there, when they know, or ought to know, that troubles have broken out, nor to indemnify those who establish themselves or sojourn in a country which offers no security on account of the presence of savage tribes, unless the government of the country has given express assurance to immigrants.

(4) The government of a Federal State composed of a certain number of smaller States, which it represents from an international point of view, may not plead, in order to avoid the responsibility which falls upon it, the fact that the constitution of the Federal State does not give it the right to control the member-States, nor the right to exact from them the discharge of their obligations.

(5) The stipulations mutually exempting States from the duty of giving their diplomatic protection ought not to comprise the cases of refusal of justice, or of evident violation of justice or of International Law.²

¹ For example, in the case of conduct which is particularly provocative to a crowd.

² The Institute of International Law has likewise—see *Annuaire*, XVIII. pp. 253 and 256—expressed the two following *vœux*:—

(a) The Institute of International Law expresses the wish that the States should avoid inserting in treaties clauses of reciprocal irresponsibility. It considers that these clauses are wrong in exempting States from the fulfilment of their duty of protecting their nationals abroad and of their duty of protecting foreigners on their territory. It considers that

the States which, on account of extraordinary circumstances, do not feel themselves at all in a position to assure protection in a sufficiently efficacious manner to foreigners on their territory, can only avoid the consequences of this condition of things by temporarily prohibiting foreigners to enter their territory.

(b) Recourse to international commissions of inquiry and to international tribunals is in general recommended for all differences which may arise on account of injury to foreigners in the course of a riot, an insurrection, or of civil war.

PART II

THE OBJECTS OF THE LAW OF NATIONS

CHAPTER I

STATE TERRITORY

I

ON STATE TERRITORY IN GENERAL

Vattel, II. §§ 79–83—Hall, § 30—Westlake, I. pp. 84–88—Lawrence, §§ 71–72—Phillimore, I. §§ 150–154—Twiss, I. §§ 140–144—Halleck, I. pp. 150–156—Taylor, § 217—Wheaton, §§ 161–163—Moore, I. § 125—Bluntschli, § 277—Hartmann, § 58—Holtzendorff in Holtzendorff, II. pp. 225–232—Gareis, § 18—Liszt, § 9—Ullmann, § 86—Heffter, §§ 65–68—Bonfilis, No. 483—Despagnet, Nos. 374–377—Pradier-Fodéré, II. No. 612—Mérignhac, II. pp. 356–366—Nys, I. pp. 402–412—Rivier, I. pp. 135–142—Calvo, I. §§ 260–262—Fiore, I. Nos. 522–530—Martens, I. § 88—Del Bon, “Proprietà territoriale degli Stati” (1867)—Fricker, “Vom Staatsgebiet” (1867).

§ 168. State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Free Town of Hamburg, the Principality of Monaco, the Republic of San Marino, or the Principality of Lichtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State before it has settled down on a territory of its own.

Concep-
tion of
State
Territory.

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial property is a term of Public Law and must not be confounded with private property. The territory of a State is not the property of the monarch, or of the Government, or even of the people of a State; it is the country which is subjected to the territorial supremacy or the *imperium* of a State. This distinction has,

however, in former centuries not been sharply drawn.¹ In spite of the *dictum* of Seneca, "Omnia rex imperio possidet, singuli dominio," the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State. But with the disappearance of absolutism this identification has likewise disappeared. It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will and without the consent of Parliament.²

It must, further, be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State. The territory is the public property of the State, and not of a nation in the sense of a race. The State community may consist of different nations, as, for instance, the British or the Swiss or the Austrians.

Different
kinds of
Territory.

§ 169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland. Such kind of territory is named "integrate territory" (*territorium clausum*). But the territory of a State may also be dismembered and consist of several pieces, such as that of Great Britain. All States with colonies have a "dismembered territory."

If a territory or a piece of it is absolutely surrounded by the territory of another State, it is named an "enclosure." Thus the Republic of San Marino is an enclosure of Italy, and Birkenfeld, a piece of the territory of the Grand Duchy of Oldenburg situated on the river Rhine, is an enclosure of Prussia.

Another distinction is that between motherland and

¹ And some writers refuse to draw it even nowadays, as, for instance, Lawrence, § 71.

² In English Constitutional Law this point is not settled. The ces-

sion of the Island of Heligoland to Germany in 1890 was, however, made conditional on the approval of Parliament.

colonies. Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. Thus, if viewed from the standpoint of the Law of Nations, the Dominion of Canada, the Commonwealth of Australia, New Zealand, and the Union of South Africa are British territory.

As regards the relation between the Suzerain and the Vassal State, it is certain that the vassal is not, in the strict sense of the term, a part of the territory of the suzerain. Crete and Egypt are not Turkish territory, although under Turkish suzerainty. But no general rule can be laid down, as everything depends on the merits of the special case, and as the vassal, even if it has some footing of its own within the Family of Nations, is internationally for the most part considered a mere portion of the Suzerain State.¹

§ 170. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations because the latter recognises the supreme authority of every State within its territory. Whatever person or thing is on or enters into that territory, is *ipso facto* subjected to the supreme authority of the respective State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus subditus est*. No foreign authority has any power within the boundaries of the home territory, although foreign Sovereigns and diplomatic envoys enjoy the so-called privilege of exterritoriality, and although the Law of Nations does, and international treaties may, restrict² the home authority in many points in the exercise of its sovereignty.

Import-
ance of
State
Territory.

§ 171. The supreme authority which a State exercises over its territory makes it apparent that on one

One Terri-
tory, one
State.

¹ See above, § 91.

² See above, §§ 126–128.

and the same territory can exist one full-Sovereign State only. Two or more full-Sovereign States on one and the same territory are an impossibility. The following five cases, of which the Law of Nations is cognisant, are apparent, but not real, exceptions to this rule.

(1) There is, first, the case of the so-called condominium. It happens sometimes that a piece of territory consisting of land or water is under the joint tenancy of two or more States, these several States exercising sovereignty conjointly over such piece and the individuals living thereon. Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia. Thus, further, Moresnet (Kelmis), on the frontier of Belgium and Prussia, is under the *condominium* of these two States¹ because they have not yet come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia. And since 1898 the Soudan is under the *condominium* of Great Britain and Egypt. It is easy to show that in such cases² there are not two States on one and the same territory, but pieces of territory, the destiny of which is not decided, and which are kept separate from the territories of the interested States³ under a separate administration. Until a final settlement the interested States do not exercise each an individual sovereignty over these pieces, but they agree upon a joint administration under their conjoint sovereignty.

(2) The second case is that of the administration of

¹ See Schröder, "Das grenzstreitige Gebiet von Moresnet" (1902).

² The New Hebrides are materially likewise under a *condominium*, namely, that of Great Britain and France, although article 1 of the Convention of October 20, 1906—see Martens, N.R.G. 3rd Ser. I. (1909), p. 523—speaks only of "a region

of joint influence" with regard to the New Hebrides. See Brunet, "Le Régime International des Nouvelles-Hebrides" (1908), and Politis in R.G. XIV. (1907), pp. 689-759.

³ As regards the proposed *condominium* over Spitzbergen, see Waultrin in R.G. XV. (1908), pp. 80-105, and Piccioni in R.G. XVI. (1909), pp. 117-134.

a piece of territory by a foreign Power, with the consent of the owner-State. Thus, since 1878 the Turkish island of Cyprus has been under British administration, and the then Turkish provinces of Bosnia and Herzegovina were from 1878 to 1908 under the administration of Austria-Hungary. In these cases a cession of pieces of territory has for all practical purposes taken place, although in law the respective pieces still belong to the former owner-State. Anyhow, it is certain that only one sovereignty is exercised over these pieces—namely, the sovereignty of the State which exercises administration. On the other hand, however, the fact that in these cases pieces of territory have for all practical purposes been ceded to another State does not empower the latter arbitrarily to annex the territory without the consent of the State owning it in law. Austria-Hungary had therefore no right to annex, in 1908, without the previous consent of Turkey, the provinces of Bosnia and Herzegovina.¹

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power. Thus, China in 1898 leased² the district of Kiauchau to Germany, Wei-Hai-Wei and the land opposite the island of Hong-Kong to Great Britain, and Port Arthur to Russia.³ Thus, further, in 1803 Sweden pledged the town of Wismar⁴ to the Grand Duchy of Mecklenburg-Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France. All such cases comprise, for all practical purposes, cessions of pieces of territory, but in strict law they remain the property of the leasing State. And such property is not a mere

¹ See above, § 50.

² See below, § 216.

³ Russia in 1905, by the Peace Treaty of Portsmouth, transferred her lease to Japan.

⁴ This transaction took place for the sum of 1,258,000 thaler, on condition that Sweden, after the lapse

of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 3 per cent. interest per annum. Sweden in 1903—see Martens, N.R.G. 2nd Ser. XXXI. (1905), pp. 572 and 574—formally waived her right to retake the town.

fiction, as some writers¹ maintain, for it is possible that the lease comes to an end by expiration of time or by rescission. Thus the lease, granted in 1894 by Great Britain to the former Congo Free State, of the so-called Lado Enclave, was rescinded² in 1906. However this may be, as long as the lease has not expired it is the lease-holder who exercises sovereignty over the territory concerned.

(4) The fourth case is that of a piece of territory of which the use, occupation, and control is in perpetuity granted by the owner-State to another State with the exclusion of the exercise of any sovereign rights over the territory concerned on the part of the grantor. In this way³ the Republic of Panama transferred, in 1903, to the United States of America a ten-mile wide strip of territory for the purpose of constructing, administering, and defending the so-called Panama Canal. In this case the grantor retains only in name the property of the territory, the transfer of the land concerned is really cession all but in name, and it is certain that only the grantee exercises sovereignty there.

(5) The fifth case is that of the territory of a Federal State. As a Federal State is considered⁴ a State of its own side by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State. But this fact is only the consequence of the other illogical fact that sovereignty is divided between a Federal State and its member-States. Two different sovereignties are here by no means exercised over one and the same territory, for so far as the Federal State possesses sovereignty the member-States do not, and *vice versa*.

¹ See, for instance, Perrinjaquet in R.G. XVI. (1909), pp. 349-367.

² By article 1 of the Treaty of London of May 9, 1906; see Martens,

N.R.G. 2nd Ser. XXXV. (1908), p. 454.

³ See below, § 184, and Boyd in R.G. XVII. (1910), pp. 614-624.

⁴ See above, § 89.

II

THE DIFFERENT PARTS OF STATE TERRITORY

§ 172. To the territory of a State belong not only the land within the State boundaries, but also the so-called territorial waters. They consist of the rivers, canals, and lakes which water the land, and, in the case of a State with a seacoast, of the maritime belt and certain gulfs, bays, and straits of the sea. These different kinds of territorial waters will be separately discussed below in §§ 176–197. In contradistinction to these real parts of State territory there are some things that are either in every point or for some part treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts of their home State.¹ And the houses in which foreign diplomatic envoys have their official residence are in many points treated as though they were parts of the home States of the respective envoys.² Again, merchantmen on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.³

Real and
Fictional
parts of
Territory.

§ 173. The subsoil beneath the territorial land and water⁴ is of importance on account of telegraph and telephone wires and the like, and further on account of the working of mines and of the building of tunnels. A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the

Territorial
Subsoil.

¹ See below, § 450.

² See below, § 390.

³ See below, § 264.

⁴ As regards the subsoil of the Open Sea, see below, §§ 287c and 287d.

subsoil to an unbounded depth belongs to the State which owns the territory on the surface.

Territorial
Atmo-
sphere.

§ 174. The space of the territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of the greatest importance on account of wires for telegraphs, telephones, electric traction, and the like; further on account of wireless telegraphy and of aviation.

(1) Nothing need be said concerning wires for telegraphs and the like, except that obviously the territorial State can prevent neighbouring States from making use of its territorial atmosphere for such wires.

(2) As regards wireless telegraphy,¹ the "International Radiographic Convention," signed at Berlin on November 3, 1906, represents an agreement² of the signatory Powers concerning the exchange of radio-telegrams on the part of coast stations and ship stations, but it contains no stipulation respecting the question in general whether the territorial State is compelled to allow the passage over its territory of waves emanating from a foreign wireless telegraphy station. There ought to be no doubt that no such compulsion exists according to customary International Law, and that therefore the territorial State can prevent the passage of such waves³ over its territory.

(3) The space of the territorial atmosphere is of particular importance with regard to aviation, but no customary or conventional rules of International Law

¹ See Meili, "Die drahtlose Telegraphie, &c." (1908); Schneeli, "Drahtlose Telegraphie und Völkerrecht" (1908); Landsberg, "Die drahtlose Telegraphie" (1909); Kausen, "Die drahtlose Telegraphie im Völkerrecht" (1910); Rolland in R.G. XIII. (1906), pp. 58-92; Fauchille in *Annuaire*, XXI. (1906), pp. 76-87; Bonfils, Nos. 531¹⁰ and 531¹¹; Despagnet, No. 433 *quater*; Meurer and Boidin in R.G. XVI. (1909), pp. 76 and 261.

² See below, §§ 287a, 287b, and 582, No. 4.

³ The Institute of International Law—see *Annuaire*, XXI. (1906), p. 328—proposes by art. 3 of its "Régime de la Télégraphie sans fil" to restrict the power of the territorial State to exclude such waves from passing over its territory to the case in which the exclusion is necessary in the interest of its security.

are as yet in existence which settle the very much controverted¹ matter. An international conference for the purpose of agreeing upon an international convention concerning aviation met in 1910 at Paris, but did not produce any result. The fact is that, since aviation is still in its infancy, practical experience is lacking concerning many questions which can only be settled when aviation has been more developed. It is tempting to apply the rules concerning the maritime belt and the Open Sea analogously to the space of the atmosphere, and, therefore, to distinguish between a zone of a certain height, in which the territorial State can exercise sovereignty, and, on the other hand, the atmosphere beyond that height, which is to be considered free like the Open Sea. This comparison between the atmosphere and the sea is, however, faulty for two reasons. Firstly, the Open Sea is an international highway that connects distant lands between which, except by sea, no communication would be possible, whereas the atmosphere is not such an indispensable highway. Secondly, navigation on the Open Sea comprises no danger whatever to the security of the different States and the lives and property of their inhabitants, whereas aviation threatens such danger to a great extent. The chief question at issue is, therefore, whether the territorial State should or should not be considered to

¹ The literature on aviation is abundant, see Holtzendorff, II. p. 230; Lawrence, § 73; Bonfils, Nos. 531¹–531²; Despagnet, Nos. 433 bis and 433 ter; Mérignhac, II. pp. 398–410; Nys, I. pp. 523–532; Grünwald, “Das Luftschiff, &c.” (1908); Meili, “Das Luftschiff, &c.” (1908); Meurer, “Luftschiffahrtsrecht” (1909); Meyer, “Die Erschliessung des Luftraums und ihre rechtlichen Folgen” (1909); Magnani, “Il diritto sullo spazio aereo e l’aeronautica” (1909); Leech, “The Jurisprudence of the Air” (1910), a reprint from the *Journal of the Royal Artillery*, vol. XXXVII.; Lycklama

a Nijeholt, “Air Sovereignty” (1910); Hazeltine, “The Law of the Air” (1911); Bielenberg, “Die Freiheit des Luftraums” (1911); Catellani, “Il diritto aereo” (1911); Sperl, “Die Luftschiffahrt, &c.” (1911); Loubeyre, “Les principes du droit aérien” (1911); Fauchille in *Annuaire*, XIX. (1902) pp. 19–114, XXIV. (1911), and in R.G. VIII. (1901), pp. 414–485, XVII. (1910), pp. 55–62; Zitelmann in the *Zeitschrift für internationales Privat- und Öffentliches Recht*, XIX. (1909), pp. 458–496; Baldwin and Kuhn in A.J. IV. (1910), pp. 95–108, 109–132; Baldwin in Z.V.V. (1911), pp. 394–399.

exercise sovereignty over the space of the atmosphere to an unbounded height, and to have the power to prevent the passage of foreign aviators altogether, or to enact stringent rules with which they have to comply. It would probably be best for the States in conference to adopt such rules concerning the whole space of the atmosphere as are similar to those valid by customary International Law for the maritime belt, that is:—to recognise, on the one hand, sovereignty of the territorial State over the space of its atmosphere, but, on the other hand, to give a right to foreign States to demand from the territorial State that foreign private—but not public!—air-vessels may pass through its atmosphere, provided they comply with the rules enacted by the territorial State for the aerial traffic.¹

Aviation through the atmosphere above the Open Sea will require special regulation on account of the dangers to the vessels of all nations traversing the sea, as will also aviation in general in time of war.

Inaliena-
bility of
Parts of
Territory.

§ 175. It should be mentioned that not every part of territory is alienable by the owner-State. For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere. Only pieces of land together with the appurtenant territorial waters are alienable parts of territory.² There is, however, one exception to this, since (boundary waters³ may wholly belong to one of the riparian States, and may therefore be transferred) through cession from one to the other riparian State without the bank itself. But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appur-

¹ The Institute of International Law is studying the question of aviation, and passed, in 1911, at its meeting in Madrid, some rules concerning the "Régime juridiques des

Aéronefs"; see *Annuaire*, XXIV. (1911).

² See below, § 185.

³ See below, § 199.

tenances of the land. For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only.

III

RIVERS

Grotius, II. c. 2, §§ 11-15—Pufendorf, III. c. 3, § 8—Vattel, II. §§ 117, 128, 129, 134—Hall, § 39—Westlake, I. pp. 142-159—Lawrence, § 92—Phillimore, I. §§ 125-151—Twiss, I. § 145—Halleck, I. pp. 171-177—Taylor, §§ 233-241—Walker, § 16—Wharton, I. § 30—Moore, I. §§ 128-132—Wheaton, §§ 192-205—Bluntschli, §§ 314, 315—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. pp. 279-406—Gareis, § 20—Liszt, §§ 9 and 27—Ullmann, §§ 87 and 105—Bonfilis, Nos. 520-531—Despagnet, Nos. 419-421—Mérignhac, II. pp. 605-632—Pradier-Fodéré, II. Nos. 688-755—Nys, I. pp. 438-441, and II. pp. 109-131—Rivier, I. p. 142 and § 14—Calvo, I. §§ 302-340—Fiore, II. Nos. 755-776, and Code, §§ 283-285 and 976-982—Martens, I. § 102, II. § 57—Delavaud, "Navigation . . . sur les fleuves internationaux" (1885)—Engelhardt, "Du régime conventionnel des fleuves internationaux" (1879), and "Histoire du droit fluvial conventionnel" (1889)—Vernesco, "Des fleuves en droit international" (1888)—Orban, "Étude sur le droit fluvial international" (1896)—Bergès, "Du régime de navigation des fleuves internationaux" (1902)—Lopez, "Regimen internacional de los rios navegables" (1905)—Huber in Z.V. I. (1906), pp. 29 and 159—Hyde in A.J. IV. (1910), pp. 145-155.

§ 176. Theory and practice agree upon the rule that rivers are part of the territory of the riparian State. Consequently, if a river lies wholly, that is, from its source to its mouth, within the boundaries of one and the same State, such State owns it exclusively. As such rivers are under the sway of one State only and exclusively, they are named "national rivers." Thus, all English, Scotch, and Irish rivers are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; the Tiber, which is Italian; the Volga, which is Russian. But many rivers do not run through the land of one and the same State only, whether they are so-called "boundary rivers," that is, rivers which separate two different

Rivers
State pro-
perty of
Riparian
States.

States from each other, or whether they run through several States and are therefore named "not-national rivers." Such rivers are not owned by one State alone.

Boundary rivers belong to the territory of the States they separate, the boundary line¹ running either through the middle of the river or through the middle of the so-called mid-channel of the river. And rivers which run through several States belong to the territories of the States concerned; each State owns that part of the river which runs through its territory.

There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the Open Sea and at the same time either separate or pass through several States between their sources and their mouths. Such rivers, too, belong to the territory of the different States concerned, but they are nevertheless named "international rivers," because freedom of navigation in time of peace on all of those rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by International Law.

Navigation
on
National,
Boundary
and not-
National
Rivers.

§ 177. There is no rule of the Law of Nations in existence which grants foreign States the right of admittance of their public or private vessels to navigation on national rivers. In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers or admit them under certain conditions only, such as the payment of a due and the like. The teaching of Grotius (II. c. 2, § 12) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the Open Sea must in time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law, it does not as yet exist.

¹ See below, § 199, and Huber in Z.V. I. (1906), pp. 29 and 159.

As regards boundary rivers and rivers running through several States, the riparian States¹ can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether unless prevented therefrom by virtue of special treaties.

§ 178. Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century. Until the French Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogether from those parts of the rivers which run through their territory, or admit them under discretionary conditions. Thus, the river Scheldt was wholly shut up in favour of the Netherlands according to article 14 of the Peace Treaty of Münster of 1648 between the Netherlands and Spain. The development of things in the contrary direction begins with a Decree of the French Convention, dated November 16, 1792, which opens the rivers Scheldt and Meuse to the vessels of all riparian States. But it was not until the Vienna Congress² in 1815 that the principle of free navigation on the international rivers of Europe by merchantmen of not only the riparian but of all States was proclaimed. The Congress itself realised theoretically that principle in making arrangements³ for free navigation on the rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the rivers Neckar, Maine, and Moselle—although more than fifty years elapsed before the principle became realised in practice.

Navigation on International Rivers.

¹ See below, § 178a.

² Articles 108–117 of the Final Act of the Vienna Congress; see Martens, N.R. II. p. 427.

³ “Règlements pour la libre navigation des rivières”; see Martens, N.R. II. p. 434.

The next step was taken by the Peace Treaty of Paris of 1856, which by its article 15¹ stipulated (free navigation on the Danube) and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations as a part of "European Public Law." A special international organ for the regulation of navigation on the Danube was created, the so-called European Danube Commission.

A further development took place at the Congo Conference at Berlin in 1884-85, since the General Act² of this Conference stipulated (free navigation on the rivers Congo and Niger) and their tributaries, and created the so-called "International Congo Commission" as a special international organ for the regulation of the navigation of the said rivers.

Side by side with these general treaties, which recognise free navigation on international rivers, stand treaties³ of several South American States with other States concerning free navigation for merchantmen of all nations on a number of South American rivers. And the Arbitration Court in the case of the boundary dispute between Great Britain and Venezuela decided in 1903 in favour of free navigation for merchantmen of all nations on the rivers Amakourou and Barima.

Thus the principle of free navigation, which is a settled fact as regards all European and some African international rivers, becomes more and more extended over all other international rivers of the world. But when several writers maintain that free navigation on all international rivers of the world is already a recognised rule of the Law of Nations, they are decidedly

¹ See Martens, N.R.G. XV. p. 776. The documents concerning navigation on the Danube are collected by Sturdza, "Recueil de documents relatifs à la liberté de navigation du Danube" (Berlin, 1904).

² See Martens, N.R.G. 2nd Ser. X. p. 417.

³ See Taylor, § 238, and Moore, I. § 131, pp. 639-651.

wrong, although such a universal rule will certainly be proclaimed in the future. There can be no doubt that as regards the South American rivers the principle is recognised by treaties between a small number of Powers only. And there are examples which show that the principle is not yet universally recognised. Thus by article 4 of the Treaty of Washington of 1854 between Great Britain and the United States the former grants to vessels of the latter free navigation on the river St. Lawrence as a revocable privilege, and article 26 of the Treaty of Washington of 1871 stipulates for vessels of the United States, but not for vessels of other nations, free navigation "for ever" on the same river.¹

However this may be, the principle of free navigation embodies the rule that vessels of all nations must be admitted without payment of any dues whatever. Yet this principle does not exclude the levy of dues from all navigating vessels for expenses incurred by the riparian States for such improvements of the navigability of rivers as embankments, breakwaters, and the like.²

I should mention that the Institute of International Law, at its meeting at Heidelberg in 1888, adopted a *Projet de Règlement international de navigation fluviale*,³ which comprises forty articles.

§ 178a. Apart from navigation on rivers, the question of the utilisation of the flow of rivers is of importance. With regard to national rivers, the question can not indeed be raised, since the local State is absolutely unhindered in the utilisation of the flow. But the flow of not-national, boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule of International Law⁴ that no

Utilisation of the flow of rivers.

¹ See Wharton, pp. 81-83; Moore, I. § 131, p. 631, and Hall, § 39.

² As regards the question of levying dues for navigation of the rivers

Rhine and Elbe, see Arndt in Z.V. IV. (1910), pp. 208-229.

³ See Annuaire, IX. p. 182.

⁴ See above, § 127.

State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or to divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use¹ of the flow of the river on its part. Since, apart from special treaties between neighbouring countries concerning special cases, neither customary nor conventional detailed rules of International Law concerning this subject are in existence, the Institute of International Law, at its meeting at Madrid² in 1911, adopted the following "*Réglementation internationale des cours d'eau internationaux au point de vue de leur force motrice et de leur utilisation industrielle ou agricole*" :—

I. When a stream of water forms the frontier of two States, neither State may, without the consent of the other, and in the absence of a special and valid legal title, make any changes prejudicial to the bank of the other State, nor allow such changes to be made by individuals, societies, &c. Moreover, neither State may on its own territory utilise the water, or allow it to be utilised, in such a manner as to cause great damage to its utilisation by the other State or by the individuals, societies, &c., of the other.

The foregoing conditions are also applicable when a lake is situated between territories of more than two States.

II. When a stream of water traverses successively the territories of two or of several States :—

(1) The point at which this stream of water traverses the frontiers of the two States, whether natural or from time immemorial, may not be changed by the establishments of one of the States without the assent of the other.

(2) It is forbidden to make any alteration injurious to the

¹ See, for instance, the treaty of Washington of January 11, 1909—Martens, N.R.G. 3rd Ser. (1911), p. 208—between Great Britain and the United States concerning the utilisation

tion of the boundary waters between the United States and Canada.

² See Annuaire, XXIV. (1911). See also Bar in R.G. XVII. (1910), pp. 281–288.

water, or to throw in injurious matter (coming from factories, &c.).

(3) Water may not be withdrawn by the establishments (especially factories for the working of hydraulic pressure) in such a quantity as to modify greatly the constitution, or, in other words, the utilisable character or the essential character, of the stream of water on its arrival at the territory nearer the mouth of the river.

The right of navigation by virtue of a title recognised by International Law cannot be restricted by any usage whatever.

(4) A State farther down the river may not make, or allow to be made, in its territory any constructions or establishments which might cause danger of flooding a State farther up the river.

(5) The foregoing rules are applicable in the same way to the case in which streams of water flow from a lake, which is situated in one territory, into the territory of another State or the territories of other States.

(6) It is recommended that the States concerned appoint common permanent Commissions which may give decisions, or at least may give their advice, when such new establishments are built, or when such modifications are made in the existing establishments, as may influence the flow of the stream of water situated on the territory of another State.

IV

LAKES AND LAND-LOCKED SEAS

Vattel, I. § 294—Hall, § 38—Phillimore, I. §§ 205–205A—Twiss, I. § 181—Halleck, I. p. 170—Moore, I. §§ 135–143—Bluntschli, § 316—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. pp. 378–385—Gareis, §§ 20–21—Liszt, § 9—Ullmann, §§ 88 and 106—Bonfils, Nos. 495–505—Despagnet, No. 407—Mérignhac, II. 587–596—Pradier-Fodéré, II. Nos. 640–649—Nys, I. pp. 447–450—Calvo, I. §§ 301, 373, 383—Fiore, II. Nos. 811–813, and Code, Nos. 279 and 1000—Martens, I. § 100—Rivier, I. pp. 143–145, 230—Mischeff, “La Mer Noire et les détroits de Constantinople” (1901)—Hunt in A.J. IV. (1910), pp. 285–313.

§ 179. Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State. Thus the Dead Sea in Palestine is Turkish, the Sea of Aral is Russian, the Lake of Como

Lakes and land-locked seas State Property of Riparian States.

is Italian territory. As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. ~~The majority of writers consider these lakes and land-locked seas parts of the surrounding territories, but several¹ dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the Open Sea. The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to the riparian States.²~~ Examples are:—The Lake of Constance,³ which is surrounded by the territories of Germany (Baden, Württemberg, Bavaria), Austria, and Switzerland (Thurgau and St. Gall); the Lake of Geneva, which belongs to Switzerland and France; the Lakes of Huron, Erie, and Ontario, which belong to British Canada and the United States; the Caspian Sea, which belongs to Persia and Russia.⁴

So-called
Inter-
national
Lakes and
Land-
locked
Seas.

§ 180. In analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States and are at the same time navigable from the Open Sea, are called "international lakes and land-locked seas." However, although some writers⁵ dissent, it must be emphasised that hitherto the Law of Nations has not recognised the principle of free navigation on such lakes and seas. The only case in which such free navigation is stipulated is that of the lakes within the Congo district.⁶ But

¹ See, for instance, Calvo, I. § 301; Caratheodory in Holtzendorff, II. p. 378.

² As regards the utilisation of the flow of such lakes and seas, the same is valid as that concerning the utilisation of the flow of rivers; see above, § 178a.

³ See Stoffel, "Die Fischerei-Verhältnisse des Bodensees unter besonderer Berücksichtigung der an ihm bestehenden Hoheitsrechte" (1906).

⁴ But the Caspian Sea is almost entirely under Russian control through the two treaties of Gulistan (1813) and Tourkmantschai (1828). See Rivier, I. p. 144, and Phillimore, I. § 205.

⁵ See, for instance, Rivier, I. p. 230; Caratheodory in Holtzendorff, II. p. 378; Calvo, I. § 301.

⁶ Article 15 of the General Act of the Congo Conference. (See Martens, N.R.G. 2nd Ser. X. p. 417.)

there is no doubt that in a near future this principle will be recognised, and practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations. Good examples of such international lakes and land-locked seas are the fore-named lakes of Huron, Erie, and Ontario.

§ 181. It is of interest to give some details regarding the Black Sea. This is a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was Turkish only, and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which are exclusively part of Turkish territory, were not open for merchantmen of all nations. But matters have changed through Russia, Roumania, and Bulgaria having become littoral States. (It would be wrong to maintain that now the Black Sea belongs to the territories of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, are nevertheless parts of the Mediterranean Sea,) and are now open to merchantmen of all nations. The Black Sea is consequently now part of the Open Sea¹ and is not the property of any State. Article 11 of the (Peace Treaty of Paris,² 1856, neutralised the Black Sea,) declared it open to merchantmen of all nations, but interdicted it to men-of-war of the littoral as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts. But although the neutralisation was stipulated "formally and in perpetuity," it lasted only till 1870. In that year, during the Franco-German War, Russia shook off the restrictions of the Treaty of Paris, and the Powers assembled at the Conference of London signed on March 13, 1871, the Treaty of London,³ by which the neutralisation of the Black Sea and the exclusion of

The Black
Sea.

¹ See below, § 252.

³ See Martens, N.R.G. XVIII. p.

² See Martens, N.R.G. XV. p. 775. 303.

men-of-war therefrom were abolished. 'But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus¹ was upheld by that treaty, as was also free navigation for merchantmen of all nations on the Black Sea.)

V

CANALS

Westlake, I. pp. 320-331—Lawrence, § 90, and Essays, pp. 41-162—Phillimore, I. §§ 899 and 207—Moore, III, §§ 336-371—Caratheodory in Holtzendorff, II. pp. 386-405—Liszt, § 27—Ullmann, § 106—Bonfils, Nos. 511-515—Despagnet, No. 418—Mérignhac, II. pp. 597-604—Pradier-Fodéré, II. Nos. 658-660—Nys, I. pp. 475-495—Rivier, I. § 16—Calvo, I. §§ 376-380—Fiore, Code, Nos. 983-987—Martens, II. § 59—Sir Travers Twiss in R.I. VII. (1875), p. 682, XIV. (1882), p. 572, XVII. (1885), p. 615—Holland, Studies, pp. 270-298—Asser in R.I. XX. (1888), p. 529—Bustamante in R.I. XXVII. (1895), p. 112—Rossignol, "Le Canal de Suez" (1898)—Camand, "Étude sur le régime juridique du Canal de Suez" (1899)—Charles-Roux, "L'Isthme et le canal de Suez" (1901)—Othalom, "Der Suezkanal" (1905)—Müller-Heymer, "Der Panamakanal in der Politik der Vereinigten Staaten" (1909)—Arias, "The Panama Canal" (1911)—Hains, Davis, Knapp, Wambough, Olney, and Kennedy in A.J. III. (1909), pp. 354 and 885, IV. (1910), p. 314, V. (1911), pp. 298, 615, 620.

Canals
State Prop-
erty of
Riparian
States.

§ 182. That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt² that all the rules regarding rivers must analogously be applied to canals. The matter would need no special mention at all were it not for the interoceanic canals which have been constructed during the second half of the nineteenth century or are contemplated in the future. And as regards two of these, the Emperor William (Kiel or Baltic) Canal, which connects the Baltic with the North Sea, and the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina, there is not much to be said. The former is a canal made mainly for strategic purposes

¹ See below, § 197.

² See, however, Holland, Studies, p. 278.

by the German Empire entirely through German territory. Although Germany keeps it open for navigation to vessels of all other nations, she exclusively controls the navigation thereof, and can at any moment exclude foreign vessels at discretion, or admit them upon any conditions she likes, apart from special treaty arrangements to the contrary. The Corinth Canal is entirely within the territory of Greece, and although the canal is kept open for navigation to vessels of all nations, Greece exclusively controls the navigation thereof.

§ 183. The most important of the interoceanic canals is that of Suez, which connects the Red Sea with the Mediterranean. Already in 1838 Prince Metternich gave his opinion that such a canal, if ever made, ought to become neutralised by an international treaty of the Powers. When, in 1869, the Suez Canal was opened, jurists and diplomatists at once discussed what means could be found to secure free navigation upon it for vessels of all kinds and all nations in time of peace as well as of war. In 1875 Sir Travers Twiss¹ proposed the neutralisation of the canal, and in 1879 the Institute of International Law gave its vote² in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising the canal, but it took several years before an agreement was actualised. This was done by the Convention of Constantinople³ of October 29, 1888,

The Suez Canal.

¹ See R.I. VII. pp. 682-694.

² See *Annuaire*, III. and IV. vol. I. p. 349.

³ See Martens, N.R.G. 2nd Ser. XV. p. 557. It must, however, be mentioned that Great Britain is a party to the Convention of Constantinople under the reservation that its terms shall not be brought into operation in so far as they would not be compatible with the transitory and exceptional condition in which Egypt is put for the time

being in consequence of her occupation by British forces, and in so far as they might fetter the liberty of action of the British Government during the occupation of Egypt. But article 6 of the Declaration respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France (see *Parliamentary Papers*, France, No. 1 (1904), p. 9), has done away with this reservation, since it stipulates the following :—"In order to ensure

between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and Turkey. This treaty comprises seventeen articles, whose more important stipulations are the following :—

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations. No attempt to restrict this free usage of the canal is allowed in time either of peace or of war. The canal can never be blockaded (article 1).

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three sea miles from its ports. Men-of-war of the belligerents have to pass through the canal without delay. They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must intervene between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy. (Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours.) All rules regarding belligerents' men-of-war are likewise valid for their prizes (articles 4, 5, 6).

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez. Belligerents, however, are not allowed to station men-of-war in these harbours (article 7). No permanent fortifications are allowed in the canal (article 2).

(4) It is the task of Egypt to secure the carrying out of the stipulated rules, but the consuls of the Powers in Egypt are charged to watch the execution of these rules (articles 8 and 9).

the free passage of the Suez Canal, his Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus

guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article 8 of that treaty will remain in abeyance." (See Holland, *Studies*, p. 293, and Westlake, *I.* p. 328.)

(5) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (article 16).

§ 184. Already in 1850 Great Britain and the United States in the Clayton-Bulwer Treaty¹ of Washington had stipulated the free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by the way of the river St. Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua. In 1881 the building of a canal through the Isthmus of Panama was taken in hand, but in 1888 the works were stopped in consequence of the financial collapse of the Company undertaking its construction. After this the United States came back to the old project of a canal by the way of the river St. Juan de Nicaragua. For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 5, 1900, the Convention of Washington, which stipulated free navigation on and neutralisation of the proposed canal in analogy with the Convention of Constantinople, 1888, regarding the Suez Canal, but ratification was refused by the Senate of the United States. In the following year, however, on November 18, 1901, another treaty was signed and afterwards ratified. This so-called Hay-Pauncefote Treaty² applies to a canal between the Atlantic and Pacific Oceans by whatever route may be considered expedient, and its five articles are the following:—

The
Panama
Canal.

Article 1

The High Contracting Parties agree that the present Treaty shall supersede the aforementioned Convention of April 19, 1850.

¹ See Martens, N.R.G. XV. p. 187, and Moore, III. §§ 351–365. According to its article 8 this treaty was also to be applied to a proposed

canal through the Isthmus of Panama.

² See Moore, III. §§ 366–368.

Article 2

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article 3

The United States adopts, as the basis of the neutralisation of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed October 29, 1888, for the free navigation of the Suez Canal, that is to say :—

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect¹ it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly neces-

¹ This does not mean that the United States have a right permanently to fortify the canal. Such a right has likewise been deduced from article 23 of the Hay-Varilla Treaty of November 18, 1903, which runs:—"If it should become necessary at any time to employ armed forces for the safety or protection of the canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes." However, it would seem that by this article 23 only temporary fortifications are contemplated. On the other hand, if read by itself, article 3 of the Hay-Varilla Treaty, according to which the Republic of Panama grants

to the United States all the rights, power, and authority which the United States would possess and exercise if she were the sovereign of the territory concerned, could be quoted as indirectly empowering the United States to fortify the Panama Canal permanently. But the question is whether article 3 must not be interpreted in connection with article 23. The fact that article 23 stipulates expressly the power of the United States temporarily to establish fortifications would seem to indicate that it was intended to exclude permanent fortifications. The question of the fortification of the Panama Canal is discussed by Hains (*contra*) and Davis (*pro*) in A.J. III. (1909), pp. 354-394 and pp. 885-908, and by Olney, Wambough, and Kennedy in A.J.V. (1911), pp. 298, 615, 620.

sary ; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible ; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

Article 4

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralisation or the obligation of the high contracting parties under the present Treaty.

Article 5

The present Treaty shall be ratified by his Britannic Majesty and by the President of the United States, by and with the advice and consent of the Senate thereof ; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of Our Lord 1901.

(Seal)
(Seal)

PAUNCEFOTE.
JOHN HAY.

On November 18, 1903, the so-called Hay-Varilla Treaty¹ was concluded between the United States and the new Republic of Panama, according to which, on the one hand, the United States guarantees and will maintain the independence of the Republic of Panama, and, on the other hand, the Republic of Panama grants² to the United States in perpetuity for the construction, administration, and protection of a canal between Colon and Panama the use, occupation, and control of a strip of land required for the construction of the canal, and, further, of land on both sides of the canal to the extent of five miles on either side, with the exclusion, however, of the cities of Panama and Colon and the harbours adjacent to these cities. According to article 18 of this treaty the canal and the entrance thereto shall be neutral in perpetuity, and shall be open to vessels of all nations as stipulated by article 3 of the Hay-Pauncefote Treaty.

¹ See Martens, N.R.G. 2nd Ser. XXXI. p. 599.

² That this grant is really cession

all but in name, was pointed out above, § 171, (4); see also below, § 216.

VI

MARITIME BELT

Grotius, II. c. 3, § 13—Vattel, I. §§ 287–290—Hall, §§ 41–42—Westlake, I. pp. 183–192—Lawrence, § 187—Phillimore, I. §§ 197–201—Twiss, I. §§ 144, 190–192—Halleck, I. pp. 157–167—Taylor, §§ 247–250—Walker, § 17—Wharton, § 32—Moore, I. §§ 144–152—Wheaton, §§ 177–180—Bluntschli, §§ 302, 309–310—Hartmann, § 58—Heffter, § 75—Stoerk in Holtzendorff, II. pp. 409–449—Gareis, § 21—Liszt, § 9—Ullmann, § 87—Bonfils, Nos. 491–494—Despagnet, Nos. 403–414—Mérignhac, II. pp. 370–392—Pradier-Fodéré, II. Nos. 617–639—Nys, I. pp. 496–520—Rivier, I. pp. 145–153—Calvo, I. §§ 353–362—Fiore, II. Nos. 801–809, and Code, Nos. 271–273, 1025—Martens, I. § 99—Bynkershoek, “De dominio maris” and “Quaestiones juris publici,” I. c. 8—Ortolan, “Diplomatie de la mer” (1856), I. pp. 150–175—Heilborn, System, pp. 37–57—Imbart-Latour, “La mer territoriale, &c.” (1889)—Godey, “La mer côtière” (1896)—Schücking, “Das Küstenmeer im internationalen Recht” (1897)—Perels, § 5—Fulton, “The Sovereignty of the Seas” (1911), pp. 537–740—Barclay in Annuaire, XII. (1892), pp. 104–136, and XIII. (1894), pp. 125–162—Martens in R.G. I. (1894), pp. 32–43—Aubert, *ibidem*, pp. 429–441—Engelhardt in R.I. XXVI. (1894), pp. 209–213—Godey in R.G. III. (1896), pp. 224–237—Lapradelle in R.G. V. (1898), pp. 264–284, 309–347.

§ 185. Maritime belt is that part of the sea which, in contradistinction to the Open Sea, is under the sway of the littoral States. But no unanimity exists with regard to the nature of the sway of the littoral States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognised that the Open Sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage of their merchantmen through the coast waters.

State Property of Maritime Belt contested.

On the other hand, many writers of great authority emphatically deny the territorial character of the maritime belt and concede to the littoral States, in the interest of the safety of the coast, only certain powers of

control, jurisdiction, police, and the like, but not sovereignty.

This is surely erroneous, since the real facts of international life would seem to agree with the first-mentioned opinion only. Its supporters rightly maintain¹ that the universally recognised fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, can coincide only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory, every littoral State must have the right to cede and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances² of the littoral and riparian States.³

Breadth of
Maritime
Belt.

§ 186. Be that as it may, the question arises how far into the sea those waters extend which are coast waters and are therefore under the sway of the littoral State. Here, too, no unanimity exists upon either the starting line of the belt on the coast or the breadth itself of the belt from such starting line.

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water mark. Others draw it along the depths where the waters cease to be navigable; others again along those depths where coast batteries can still be erected, and so on.⁴ But the number of those who draw it along low-water mark is increasing. The

¹ Hall, p. 158. The question is treated with great clearness by Heilborn, "System," pp. 37-57, and Schücking, pp. 14-20.

² See above, § 175. Bynkershoek's ("De Dominio Maris," c. 5) opinion that a littoral State can alienate its maritime belt without the coast itself, is at the present day untenable.

³ The fact that art. 1 of Conven-

tion 13 (Neutral Rights and Duties in Maritime War) of the second Hague Peace Conference, 1907, speaks of sovereign rights . . . in neutral waters would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of sovereignty.

⁴ See Schücking, p. 13.

Institute of International Law¹ has voted in favour of this starting line, and many treaties stipulate the same.

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States. And although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally² recognised as the breadth of the maritime belt. But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. And although Great Britain, France, Austria, the United States of America, and other States, in Municipal Laws and International Treaties still adhere to a breadth of one marine league, the time will come when by a common agreement of the States such breadth will be very much extended.³ As regards Great Britain, the Territorial Waters Jurisdiction Act⁴ of 1878 (41 and 42 Vict. c. 73) specially recognises the extent of the territorial maritime belt as three miles, or one marine league, measured from the low-water mark of the coast.

§ 187. Theory and practice agree upon the following Fisheries,
Cabotage,

¹ See Annuaire, XIII. p. 329.

² But not universally. Thus Norway claims a breadth of four miles and Spain even a breadth of six miles. As regards Norway, see Aubert in R.G. I. (1894), pp. 429-441.

³ The Institute of International

Law has voted in favour of six miles, or two marine leagues, as the breadth of the belt. See Annuaire, XIII. p. 281.

⁴ See above, § 25, and Maine, p. 39.

Police, and
Maritime
Cere-
monials
within the
Belt.

principles with regard to fisheries, cabotage, police, and maritime ceremonials within the maritime belt :—

(1) The littoral State can exclusively reserve the fishery within the maritime belt¹ for its own subjects, whether fish or pearls or amber or other products of the sea are in consideration.

(2) The littoral State can, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called cabotage,² and reserve this cabotage exclusively for its own vessels. Cabotage meant originally navigation and trade along the same stretch of coast between the ports thereof, such coast belonging to the territory of one and the same State. However, the term cabotage or coasting trade as used in commercial treaties comprises now³ sea trade between any two ports of the same country, whether on the same coasts or different coasts, (provided always that the different coasts are all of them the coasts of one and the same country) as a political and geographical unit in contradistinction to the coasts of colonial dependencies of such country.

(3) The littoral State can exclusively exercise police and control within its maritime belt in the interest of its custom-house duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

(4) The littoral State can make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt.⁴

Naviga-
tion

§ 188. Although the maritime belt is a portion of

¹ All treaties stipulate for the purpose of fishery a three miles wide territorial maritime belt. See, for instance, article 1 of the Hague Convention concerning police and fishery in the North Sea of May 6,

1882. (Martens, N.R.G. 2nd Ser. IX. p. 556.)

² See Pradier-Fodéré, V. Nos. 2441, 2442.

³ See below, § 579, where the matter is more amply treated.

⁴ See Twiss, I. § 194.

the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, cabotage excepted. And it is the common conviction¹ that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the Open Sea, for without this right navigation on the Open Sea by vessels of all nations would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the littoral State may spend a considerable amount of money for the erection and maintenance of lighthouses and other facilities for safe navigation within its maritime belt, it cannot make merely passing foreign vessels pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the littoral State. Some writers² maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a littoral State can prevent such passage. They are certainly mistaken. An attempt on the part of a littoral State to prevent free navigation through the maritime belt in time of peace would meet with stern opposition on the part of all other States.

But a right of foreign States for their men-of-war to pass unhindered through the maritime belt is not generally recognised. Although many writers assert the existence of such a right, many others emphatically

¹ See above, § 142.

² Klüber, § 76 ; Pradier-Fodéré, II. No. 628.

deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. And it may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.¹

Juris-
diction
within the
Belt.

§ 189. That the littoral State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised. Thus it can exclude foreign pilots, can make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. It is further agreed that foreign merchantmen casting anchor within the belt or entering a port,² fall at once and *ipso facto* under the jurisdiction of the littoral State. But it is a moot point whether such foreign vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878 (41 & 42 Vict. c. 73), which claims such jurisdiction, has called forth protests from many writers.³ The controversy itself can be decided only by the practice of the States. The British Act quoted, the basis of which is, in my opinion, sound and reasonable, is a powerful factor in initiating such a practice; but as

¹ See below, § 449.

² The Institute of International Law—see *Annuaire*, XVII. (1898), p. 273—adopted at its meeting at the Hague in 1898 a “*Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*” comprising seven rules.

³ See Perels, pp. 69–77. The

Institute of International Law, which at its meeting at Paris in 1894 adopted a body of eleven rules regarding the maritime belt, gulfs, bays, and straits, voted against the jurisdiction of a littoral State over foreign vessels merely passing through the belt. See *Annuaire*, XIII. p. 328.

yet no common practice of the States can be said to exist.

§ 190. Different from the territorial maritime belt is the zone of the Open Sea, over which a littoral State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound to one of their ports as are approaching, but not yet within, their territorial maritime belt.¹ Twiss and Phillimore agree that in strict law these Municipal Laws have no basis, since every State is by the Law of Nations prevented from extending its jurisdiction over the Open Sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no measure is taken within the territorial maritime belt of another nation. I doubt not that in time special arrangements will be made as regards this point by a universal international convention. But I believe that, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, (a customary rule of the Law of Nations may be said to exist) which allows littoral States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound to their ports as are approaching, although not yet within, their territorial maritime belt.

Zone for
Revenue
and Sani-
tary Laws.

¹ See, for instance, the British so-called *Hovering Acts*, 9 Geo. II. c. 35 and 24 Geo. III. c. 47. The matter is treated by Moore, I. § 151; Taylor, § 248; Twiss, I. § 190; Phillimore, I. § 198; Halleck, I. p.

157; Stoerk in Holtzendorff, II. pp. 475-478; Perels, § 5, pp. 25-28. See also Hall, "Foreign Powers and Jurisdiction," §§ 108 and 109, and *Annuaire*, XIII (1894), pp. 135 and 141.

VII

GULFS AND BAYS

Vattel, I. § 291—Hall, § 41—Westlake, I. pp. 183–192—Lawrence, § 72—Phillimore, I. §§ 196–206—Twiss, I. §§ 181–182—Halleck, I. pp. 165–170—Taylor, §§ 229–231—Walker, § 18—Wharton, I. §§ 27–28—Moore, I. § 153—Wheaton, §§ 181–190—Bluntschli, §§ 309–310—Hartmann, § 58—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419–428—Gareis, § 21—Liszt, § 9—Ullmann, § 88—Bonfils, No. 516—Despagnet, Nos. 405–406—Mérignhac, II. pp. 394–397—Pradier-Fodéré, II. Nos. 661–681—Nys, I. pp. 441–447—Rivier, I. pp. 153–157—Calvo, I. §§ 366–367—Fiore, II. Nos. 808–815, and Code, Nos. 278–279—Martens, I. § 100—Perels, § 5—Schücking, “Das Küstenmeer, im internationalen Recht” (1897), pp. 20–24—Barclay in Annuaire, XII. pp. 127–129—Oppenheim in Z.V. I. (1907), pp. 579–587, and V. (1911), pp. 74–95.

Territorial
Gulfs and
Bays.

§ 191. It is generally admitted that such gulfs and bays as are enclosed by the land of one and the same littoral State, and whose entrance from the sea is narrow enough to be commanded by coast batteries erected on one or both sides of the entrance, belong to the territory of the littoral State even if the entrance is wider¹ than two marine leagues, or six miles.

Some writers maintain that gulfs and bays whose entrance is wider than ten miles, or three and a third marine leagues, cannot belong to the territory of the littoral State, and the practice of some States accords with this opinion. But the practice of other countries,

¹ I have no reason to alter the above statement, although Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the name of the British Government, that they considered such bays only to be territorial as possessed an entrance *not* wider than six miles. The future will have to show whether Great Britain and her self-governing colonies consider themselves bound by this statement. No writer of authority can be quoted in favour of it, although Walker (§ 18) and Wilson and Tucker (5th ed., 1910, § 53) state it. Westlake (vol. I. p. 187) cannot be cited in favour of it, since he distinguishes between bays and gulfs in such a way as is

not generally done by international lawyers, and as is certainly not recognised by geography; for the very examples which he enumerates as *gulfs* are all called *bays*, namely those of Conception, of Cancale, of Chesapeake, and of Delaware. In the North Atlantic Coast Fisheries case, between the United States and Great Britain, which was decided by the Permanent Court of Arbitration at the Hague in 1910, the United States—see the official publication of the case, p. 136—also contended that only such bays could be considered territorial as possessed an entrance not wider than six miles, but the Court refused to agree to this contention.

approved by many writers, goes beyond this limit. Thus Great Britain holds the Bay of Conception in Newfoundland to be territorial, although it goes forty miles into the land and has an entrance more than twenty miles wide. And the United States claim the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,¹ although many European writers oppose this claim. The Institute of International Law has voted in favour of a twelve miles wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years.²

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are : The Zuider Zee is Dutch ; the Frische Haff, the Kurische Haff, and the Bay of Stettin, in the Baltic, are German, as is also the Jade Bay in the North Sea. The whole matter calls for an international congress to settle the question once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,³ which include portions of the sea between lines drawn from headland to headland.

§ 192. Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one littoral State, however narrow their

Non-territorial
Gulfs and
Bays.

¹ See Taylor, § 229 ; Wharton, I. §§ 27 and 28 ; Moore, I. § 153.

² See *Annuaire*, XIII. p. 329.

³ Whereas Hall (§ 41, p. 162) says : " England would, no doubt, not attempt any longer to assert a right of property over the King's Cham-

bers," Phillimore (I. § 200) still keeps up this claim. The attitude of the British Government in the Moray Firth Case—see below, p. 264—would seem to demonstrate that this claim is no longer upheld. See also Lawrence, § 87, and Westlake, I. p. 188.

entrance may be, are non-territorial. They are parts of the Open Sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated, they are in time of peace and war open to vessels of all nations including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing.

An illustrative case is that of the fisheries in the Moray Firth. By article 6 of the Herring¹ Fishery (Scotland) Act, 1889, beam and otter trawling is prohibited within certain limits of the Scotch coast, and the Moray Firth inside a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire is included in the prohibited area. In 1905, Mortensen, the captain of a Norwegian fishing vessel, but a Danish subject, was prosecuted for an offence against the above-mentioned article 6, convicted, and fined by the Sheriff Court at Dornoch, although he contended that the incriminating act was committed outside three miles from the coast. He appealed to the High Court of Justiciary, which,² however, confirmed the verdict of the Sheriff Court, correctly asserting that, whether or not the Moray Firth could be considered as a British territorial bay, the Court was bound by a British Act of Parliament even if such Act violates a rule of International Law. The British Government, while recognising that the Scotch Courts were bound by the Act of Parliament concerned, likewise recognised that, the Moray Firth not being a British territorial bay, foreign fishing vessels could not be compelled to comply with an Act of Parliament regulating the mode of fishing in the Moray Firth outside three miles from the coast, and therefore remitted Mortensen's fine. To remedy the conflict between article 6 of the above-mentioned Herring

¹ 52 and 53 Vict. c. 23.

² *Mortensen v. Peters*, "The Scotch Law Times Reports," vol. 14, p. 227.

Fishery (Scotland) Act, 1889, and the requirements of International Law, Parliament passed the Trawling in Prohibited Areas Prevention Act,¹ 1909, according to which no prosecution can take place for the exercise of prohibited fishing methods outside the three miles from the coast, but the fish so caught may not be landed or sold in the United Kingdom.²

§ 193. As regards navigation and fishery within territorial gulfs and bays, the same rules of the Law of Nations are valid as in the case of navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the littoral State.³ And navigation, cabotage excepted, must be open to merchantmen of all nations, but foreign men-of-war need not be admitted.

Navigation and Fishery in Territorial Gulfs and Bays.

VIII

STRAITS

Vattel, I. § 292—Hall, § 41—Westlake, I. pp. 193–197—Lawrence, §§ 87–89—Phillimore, I. §§ 180–196—Twiss, I. §§ 183, 184, 189—Halleck, I. pp. 165–170—Taylor, §§ 229–231—Walker, § 17—Wharton, §§ 27–29—Wheaton, §§ 181–190—Moore, I. §§ 133–134—Bluntschli, § 303—Hartmann, § 65—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419–428—Gareis, § 21—Liszt, §§ 9 and 26—Ullmann, § 88—Bonfils, Nos. 506–511—Despagnet, Nos. 415–417—Pradier-Fodéré, II. Nos. 650–656—Nys, I. pp. 451–474—Rivier, I. pp. 157–159—Calvo, I. §§ 368–372—Fiore, II. Nos. 745–754, and Code, Nos. 280–281—Martens, I. § 101—Holland, Studies, p. 277.

§ 194. All straits which are so narrow as to be under the command of coast batteries erected either on one or both sides of the straits, are territorial. Therefore,

What Straits are Territorial.

¹ 9 Edw. VII. c. 8.

² See Oppenheim in Z.V. V. (1911), pp. 74–95.

³ The Hague Convention concerning police and fishery in the North Sea, concluded on May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland reserves by its article 2 the fishery for subjects of the littoral States of such bays as have an

entrance from the sea not wider than ten miles, but reserves likewise a maritime belt of three miles to be measured from the line where the entrance is ten miles wide. Practically the fishery is therefore reserved for subjects of the littoral State within bays with an entrance thirteen miles wide. See Martens, N.R.G. 2nd Ser. IX. (1884), p. 556.

straits of this kind which divide the land of one and the same State belong to the territory of such State. Thus the Solent, which divides the Isle of Wight from England, is British, the Dardanelles and the Bosphorus are Turkish, and both the Kara and the Yugor Straits, which connect the Kara Sea with the Barents Sea, are Russian. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, the boundary line running, failing a special treaty making another arrangement, through the mid-channel.¹ Thus the Lymoon Pass, the narrow strait which separates the British island of Hong Kong from the continent, was half British and half Chinese as long as the land opposite Hong Kong was Chinese territory.

It would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries are no longer upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But it must be emphasised that this right is contested, and I believe that Great Britain would now no longer uphold her former claim,² at least the Territorial Waters Jurisdiction Act 1878 does not mention it.

Navigation,
Fishery,
and Jurisdiction in
Straits.

§ 195. All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, there-

¹ See below, § 199.

² See Phillimore, I. § 189, and above, § 191 (King's Chambers). Concerning the Bristol Channel, Hall (§ 41, p. 162, note 2) remarks: "It was apparently decided by the Queen's Bench in *Reg. v. Cunningham* (Bell's "Crown Cases," 86) that

the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the Channel which lies within Steepholm and Flatholm." See also Westlake, I. p. 188, note 3.

fore, cannot¹ be excluded; foreign men-of-war must be admitted to such straits as form part of the highways for international traffic;² the right of fishery may exclusively be reserved for subjects of the littoral State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each littoral State within the boundary line running through the mid-channel or otherwise as by treaty arranged.

It must, however, be stated that foreign merchantmen cannot be excluded from the passage through territorial straits only when these connect two parts of the Open Sea. In case a territorial strait belonging to one and the same State connects a part of the Open Sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same State—as, for instance, the Strait of Kertch³ at present, and formerly the Bosphorus and the Dardanelles⁴—foreign vessels can be excluded therefrom.

§ 196. The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without any dues and tolls whatever, had one exception until the year 1857. From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so-called Sound Dues.⁵ Whereas in former cen-

The
former
Sound
Dues.

¹ The claim of Russia—see Waultrin in R.G. XV. (1908), p. 410—to have a right to exclude foreign merchantmen from the passage through the Kara and the Yugor Straits, is therefore unfounded. As regards the Kara Sea, see below, § 253, note 2.

² As, for instance, the Straits of Magellan. These straits were neutralised in 1881—see below, § 568, and vol. II. § 72—by a treaty between

Chili and Argentina. See Abribat, “Le détroit de Magellan au point de vue international” (1902); Nys, I. pp. 470–474; and Moore, I. § 134.

³ See below, § 252.

⁴ See below, § 197.

⁵ See the details, which have historical interest only, in Twiss, I. § 188; Phillimore, I. § 189; Wharton, I. § 29; and Scherer, “Der Sundzoll” (1845).

turies these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues. In 1857, however, an arrangement¹ was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark. And in the same year the United States entered into a convention² with Denmark for the free passage of their vessels, and likewise paid an indemnity. With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised.

The Bosphorus
and Dardanelles.

§ 197. The Bosphorus and Dardanelles, the two Turkish territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned.³ So long as the Black Sea was entirely enclosed by Turkish territory and was therefore a portion of this territory, Turkey could exclude⁴ foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties. But when in the eighteenth century Russia became a littoral State of the Black Sea, and the latter, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus and the Dardanelles to foreign merchantmen. But she always upheld the rule that foreign men-of-war should be excluded from these straits. And by article 1 of the Convention of London of July 10, 1841, between Turkey, Great Britain, Austria, France, Prussia, and Russia, this rule was once for all accepted. Article 10 of the Peace Treaty of Paris of 1856 and the Conven-

¹ The Treaty of Copenhagen of March 14, 1857. See Martens, N.R.G. XVI. 2nd part, p. 345.

² Convention of Washington of April 11, 1857. See Martens, N.R.G. XVII. 1st part, p. 210.

³ See Holland, "The European Concert in the Eastern Question," p. 225, and Perels, p. 29.

⁴ See above, § 195.

tion No. 1 annexed to this treaty, and, further, article 2 of the Treaty of London, 1871, again confirm the rule, and all those Powers which were not parties to these treaties submit nevertheless to it.¹ According to the Treaty of London of 1871, however, the Porte can open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856.

On the whole, the rule has in practice always been upheld by Turkey. Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople can be admitted by the provisions of the Peace Treaty of Paris of 1856. And on several occasions when Turkey has admitted a foreign man-of-war carrying a foreign monarch on a visit to Constantinople, there has been no opposition by the Powers.² But when, in 1902, Turkey allowed four Russian torpedo destroyers to pass through her straits on the condition that these vessels should be disarmed and sail under the Russian commercial flag, Great Britain protested and declared that she reserved the right to demand similar privileges for her men-of-war should occasion arise. As far as I know, however, no other Power has joined Great Britain in this protest. On the other hand, no protest was raised when, in 1904, during the Russo-Japanese war, two vessels belonging to the Russian volunteer fleet in the Black Sea were allowed to pass through to the Mediterranean, for nobody could presume that these vessels, which were flying the Russian commercial flag, would later on convert themselves into men-of-war by hoisting the Russian war flag.³

¹ The United States, although she actually acquiesces in the exclusion of her men-of-war, seems not to consider herself bound by the Convention of London, to which she is

not a party. See Wharton, I. § 29, pp. 79 and 80, and Moore, I. § 134, pp. 666-668.

² See Perels, p. 30.

³ See below, vol. II. § 84.

IX

BOUNDARIES OF STATE TERRITORY

Grotius, II. c. 3, § 18—Vattel, I. § 266—Hall, § 38—Westlake, I. pp. 141–142—Twiss, I. §§ 147–148—Taylor, § 251—Moore, I. §§ 154–162—Bluntschli, §§ 296–302—Hartmann, § 59—Heffter, § 66—Holtzendorff in Holtzendorff, II. pp. 232–239—Gareis, § 19—Liszt, § 9—Ullmann, § 91—Bonfilis, Nos. 486–489—Despagnet, No. 377—Pradier-Fodéré, II. Nos. 759–777—Mérignhac, II. p. 358—Nys, I. pp. 413–422—Rivier, I. § 11—Calvo, I. §§ 343–352—Fiore, II. Nos. 799–806, and Code, Nos. 1040–1049—Martens, I. § 89—Lord Curzon of Kedleston, “Frontiers” (Romanes lecture of 1907).

Natural
and Arti-
ficial
Bounda-
ries.

§ 198. Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea. The course of the boundary lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries. *Natural* boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like. *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary-line. They may consist of posts, stones, bars, walls,¹ trenches, roads, canals, buoys in water, and the like. It must, however, be borne in mind that the distinction between artificial and natural boundaries is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity, for the purpose of marking the frontier.

Boundary
Waters.

§ 199. Natural boundaries consisting of water must be specially discussed on account of the different kinds of boundary waters. Such kinds are rivers, lakes, land-locked seas, and the maritime belt.

(1) Boundary rivers² are such rivers as separate

¹ The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example.

² See Huber in Z.V. I. (1906), pp. 29–52 and 159–217.

two different States from each other.¹ If such river is not navigable, the imaginary boundary line runs down the middle of the river, following all turnings of the border line of both banks of the river. On the other hand, in a navigable river the boundary line runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river. It is, thirdly, possible that the boundary line is the border line of the river, so that the whole bed belongs to one of the riparian States only.² But this is an exception created by treaty or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State.³ And it must be remembered that, since a river sometimes changes its course more or less, the boundary line running through the middle or the *Thalweg* or along the border line is thereby also altered. In case a bridge is built over a boundary river, the boundary line runs, failing special treaty arrangements, through the middle of the bridge. As regards the boundary lines running through islands rising in boundary rivers and through the abandoned beds of such rivers, see below, §§ 234 and 235.

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States.⁴

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

¹ This case is not to be confounded with the other, in which a river runs through the lands of two different States. In this latter case the boundary line runs across the river.

² See above, § 175.

³ See Twiss, I. §§ 147 and 148, and Westlake, I. p. 142.

⁴ See above, § 179.

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(4) In a narrow strait separating the lands of two different States the boundary line runs either through the middle or through the mid-channel,¹ unless special treaties make different arrangements.

Boundary
Moun-
tains.

§ 200. Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other. Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed. But it is quite possible that boundary mountains belong wholly to one of the States which they separate.²

Boundary
Disputes.

§ 201. Boundary lines are, for many reasons, of such vital importance that disputes relating thereto are inevitably very frequent and have often led to war. During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably. The simplest way in which this can be done is always by a boundary treaty, provided the parties can come to terms.³ In other cases arbitration can settle the matter, as, for instance, in the Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903. Sometimes International Commissions are specially appointed to settle the boundary lines. In this way the boundary lines between Turkey, Bulgaria, Servia, Montenegro, and Roumania were settled after the Berlin Congress of 1878. It sometimes happens that the States concerned, instead of settling the boundary line, keep a strip of land between their territories under their joint tenure and administration, so that a so-called condominium comes into existence,

¹ See Twiss, I. §§ 183 and 184, and above, § 194.

² See Fiore, II. No. 800.

³ A good example of such a boundary treaty is that between Great Britain and the United States of America respecting the demarca-

tion of the international boundary between the United States and the Dominion of Canada, signed at Washington on April 11, 1908. See Martens, N.R.G. 3rd Ser. IV. (1911), p. 191.

as in the case of Moresnet (Kelmis) on the Prusso-Belgian frontier.¹

§ 202. Whereas the term "natural boundaries" in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically² in various different meanings. Thus the French often speak of the river Rhine as their "natural" boundary, as the Italians do of the Alps. Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's "natural" boundary. Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the "natural" boundary of a State, whether or not these parts belong to the territory of the respective State. It is obvious that all these and other meanings of the term "natural boundaries" are of no importance to the Law of Nations, whatever value they may have politically.

Natural
Boundaries
sensu politico.

X

STATE SERVITUDES

Vattel, I. § 89—Hall, § 42*—Westlake, I. p. 61—Phillimore, I. §§ 281–283—Twiss, I. § 245—Taylor, § 252—Moore, I. §§ 163–168, II. § 177—Bluntschli, §§ 353–359—Hartmann, § 62—Heffter, § 43—Holtzendorff in Holtzendorff, II. pp. 242–252—Gareis, § 71—Liszt, §§ 8 and 19—Ullmann, § 99—Bonfils, Nos. 340–344—Despagnet, Nos. 190–192—Mérignhac, II. pp. 366–368—Pradier-Fodéré, II. Nos. 834–845, 1038—Rivier, I. pp. 296–303—Nys, II. pp. 271–279—Calvo, III. § 1583—Fiore, I. § 380, and Code, Nos. 1095–1097—Martens, I. §§ 94–95—Clauss, "Die Lehre von den Staatsdienstbarkeiten" (1894)—Fabres, "Des servitudes dans le droit international" (1901)—Hollatz, "Begriff und Wesen der Staatsservituten" (1909)—Labrousse, "Des servitudes en droit international public" (1911)—Nys in R.I. 2nd Ser. VII. (1905), pp. 118–125, and XIII. (1911), pp. 312–323.

§ 203. State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State by which a part or the whole of its territory

Concep-
tion of
State Ser-
vitudes.

¹ See above, § 171, No. 1.

² See Rivier, I. p. 166.

is in a limited way made perpetually to serve a certain purpose or interest of another State. Thus a State may by a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

Servitudes must not be confounded¹ with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named "natural" restrictions of territorial supremacy (*servitudes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitudes juris gentium voluntariae*) which constitute the State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude, but a "natural" restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt.

That State servitudes are or may on occasions be of great importance, there can be no doubt whatever. The vast majority² of writers and the practice of the States accept, therefore, the conception of State servitudes, although they do not agree with regard to the definition and the width of the conception, and although, consequently, in many cases the question is disputed whether a certain restriction upon territorial supremacy is or is not a State servitude.

The theory of State servitudes has of late been rejected by the Permanent Court of Arbitration at the Hague in the case (1910) of the North Atlantic

¹ This is done, for instance, by Heffter (§ 43), Martens (§ 94), Nys (II. p. 271), and Hall (§ 42*); the latter speaks of the right of innocent use of territorial seas as a servitude.

² The conception of State servitudes is rejected by Bulmerincq (§ 49), Gareis (§ 71), Liszt (§§ 8 and 19), Jellinek ("Allgemeine Staatslehre," p. 366).

³ See the official publication of the case, pp. 115-116; Hogg in *The Law Quarterly Review*, XXVI. (1910), pp. 415-417; Richards in *The Journal of the Society of Comparative Legislation*, New Series, XI. (1910), pp. 18-27; Lansing in A.J. V. (1911), pp. 1-31; Balch and Louter in R.I. 2nd Ser. XIII. (1911), pp. 5-23, 131-157.

Coast Fisheries between Great Britain and the United States, chiefly for the three reasons (that a servitude in International Law predicated an express grant of a sovereign right, that the doctrine of international servitude originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, and that this doctrine, being little suited to the principle of sovereignty which prevails in States under a constitutional government and to the present international relations of Sovereign States, had found little, if any, support from modern publicists. It is hardly to be expected that this opinion of the Court will induce theory and practice to drop the conception of State servitudes, which is of great value because it fitly covers those restrictions on the territorial supremacy of the State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. That the doctrine of State servitudes originated in the peculiar conditions of the Holy Roman Empire does not make it unfit for the conditions of modern life if its practical value can be demonstrated. Further, the assertion that the doctrine is but little suited to the principle of sovereignty which prevails in States under a constitutional government, and has, therefore, found little, if any, support from modern publicists, does not agree with the facts. Lastly, the statement that a servitude in International Law predicated an express grant of a sovereign right, is not based on any other authority than the contention of the United States, which made this unfounded statement in presenting their case before the Tribunal. The fact is that a State servitude, although to a certain degree it restricts the sovereignty (territorial supremacy) of the State concerned, does as little as any other restriction upon the sovereignty of a State confer a sovereign right upon the State in favour of which it is established.

Subjects
of State
Servi-
tudes.

§ 204. Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*). Formerly some writers¹ maintained that private individuals and corporations were able to acquire a State servitude; but nowadays it is agreed that this is not possible, since the Law of Nations is a law between States only and exclusively. Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

On the other hand, every State can acquire and grant State servitudes, although some States may, in consequence of their particular position within the Family of Nations, be prevented from acquiring or granting some special kind or another of State servitudes. Thus neutralised States are in many points hampered in regard to acquiring and granting State servitudes, because they have to avoid everything that could drag them indirectly into war. Thus, further, half-Sovereign and part-Sovereign States may not be able to acquire and to grant certain State servitudes on account of their dependence upon their superior State. But apart from such exceptional cases, even not-full Sovereign States can acquire and grant State servitudes, provided they have any international status at all.

Object of
State Ser-
vitudes.

§ 205. [The object of State servitudes is always the whole or a part of the territory of the State the territorial supremacy of which is restricted by any such servitude.²] Since the territory of a State includes not only the land but also the rivers which water the land, the maritime belt, the territorial subsoil, and the terri-

¹ Bluntschli, § 353; Heffter, § 44.

² The contention of the United States, adopted by the Hague Arbitration Tribunal, in 1910, in the case of the North Atlantic Coast

Fisheries, that a State servitude conferred a sovereign right upon the State in favour of which it is established, was refuted above in § 203, p. 275.

torial atmosphere, all these can, as well as the service of the land itself, be an object of State servitudes. [Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like. And should ever aërostation become so developed as to be of practical utility, a State servitude might be created through a State acquiring a perpetual right to send military aerial vehicles through the territorial atmosphere of a neighbouring State.] It must, however, be emphasised that the Open Sea can never be the object of a State servitude, since it is no State's territory.

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction imposed upon a State by a treaty not to keep an army beyond a certain size is certainly a restriction on territorial supremacy, but is not, as some writers¹ maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town, place, or island,² or to the claim of another State for its subjects to be allowed the

¹ See, for instance, Bluntschli, § 356.

² Thus by article 32 of the peace treaty of Paris, 1856, and by the Convention of March 30, 1856, between Great Britain, France, and Russia, annexed to the peace treaty

of Paris—see Martens, N.R.G. XV. pp. 780 and 788—Russia is prevented from fortifying the Aland Islands in the Baltic. See below, § 522, and Waultrin in R.G. XIV. pp. 517–533. See also A.J. II. (1908), p. 397.

fishery within the former's territorial belt ;¹ in all these and the like² cases the territorial supremacy of a State is in such a way restricted that a part or the whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes.³

Different
kinds of
State Ser-
vitudes.

§ 206. According to different qualities different kinds of State servitudes must be distinguished.

(1) Affirmative, active, or positive, are those servitudes which give the right to a State to perform certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to let an armed force pass through a certain territory (*droit d'étape*), or to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like.

(2) Negative, are such servitudes as give a right to

¹ Examples of such fishery servitudes are :—

(a) The former French fishery rights in Newfoundland which were based on article 13 of the Treaty of Utrecht, 1713, and on the Treaty of Versailles, 1783. See the details regarding the Newfoundland Fishery Dispute, in Phillimore, I. § 195; Clauss, pp. 17–31; Geffcken in R.I. XXII. p. 217; Brodhurst in *Law Magazine and Review*, XXIV. p. 67. The French literature on the question is quoted in Bonfils, No. 342, note 1. The dispute is now settled by France's renunciation of the privileges due to her according to article 13 of the Treaty of Utrecht, which took place by article 1 of the Anglo-French Convention signed in London on April 8, 1904 (see Martens, N.R.G. 2nd Ser. XXXII. (1905), p. 29). But France retains, according to article 2 of the latter Convention, the right of fishing for her subjects in certain parts of the territorial waters of Newfoundland.

(b) The fishery rights granted by Great Britain to the United States of America in certain parts of the British North Atlantic Coast by article 1 of the Treaty of 1818 which

gave rise to disputes extending over a long period. The dispute is now settled by an award of the Hague Permanent Court of Arbitration given in September (1910). That the Court refused to recognise the conception of State servitudes, was pointed out above, § 203. See above, § 203, and the literature there quoted.

² Phillimore (I. § 283) quotes two interesting State servitudes which belong to the past. According to articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar.

³ The controverted question whether neutralisation of a State creates a State servitude is answered by Clauss (p. 167) in the affirmative, but by Ullmann (§ 99), correctly, I think, in the negative. But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State. In the latter case a State servitude is indeed created.

a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways. Thus a State can have a right to demand that a neighbouring State shall not fortify certain towns near the frontier, that another State shall not allow foreign men-of-war in a certain harbour.¹

(3) Military, are those State servitudes which are acquired for military purposes, such as the right to keep troops in a foreign fortress, or to let an armed force pass through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like.

(4) Economic, are those servitudes which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right of fisheries in foreign territorial waters, to build a railway on or lay a telegraph cable through foreign territory, and the like.

§ 207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the part of the territory affected comes by subjugation or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Hüningen became in 1871, together with the whole of Alsace, German territory, the State servitude created by the Treaty of Paris, 1815, that Hüningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished.² Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny became French, the

Validity of
State Ser-
vitudes.

¹ Affirmative State servitudes consist in *patiendō*, negative servitudes in *non faciendō*. The rule of Roman Law *servitus in faciendō consistere ne-*

quit has been adopted by the Law of Nations.

² Details in Clauss, pp. 15-17.

State servitude created by article 92 of the Act of the Vienna Congress, 1815, that Switzerland should have temporarily during war the right to locate troops in these provinces, was not extinguished.¹

It is a moot point whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral. Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops? ²

Extinction of State Servitudes.

§ 208. State servitudes are extinguished by agreement between the States concerned, or by express or tacit³ renunciation on the part of the State in whose interest they were created. They are not, according to the correct opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State. But it is difficult to understand why, although State servitudes are called into existence through treaties, it is sometimes maintained that the clause *rebus sic stantibus*⁴ cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable. It is a matter of course that in such case the restricted State must previously try to come to terms with the State which is the subject of the servitude. But if an agreement cannot be arrived at on account of the unreasonableness of the other party, the clause *rebus sic stantibus* may well be resorted to.⁵ The fact that the practice of the States does not provide any example of an appeal to this clause

¹ Details in Clauss, pp. 8–15.

² This question became practical when in 1900, during the South African war, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa. See below, vol. II. §§ 306 and 323; Clauss, pp. 212–217; and Dumas in R.G. XVI. (1909), pp. 289–316.

³ See Bluntschli, § 359 b. The opposition of Clauss (p. 219) and others to this sound statement of Bluntschli's is not justified.

⁴ See below, § 539.

⁵ See Bluntschli, § 359 d, and Pradier-Fodéré, II. No. 845. Clauss (p. 222) and others oppose this sound statement likewise.

for the purpose of doing away with a State servitude proves only that such appeal has hitherto been unnecessary.

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XI

MODES OF ACQUIRING STATE TERRITORY

Vattel, I. §§ 203-207—Hall, § 31—Westlake, I. pp. 84-116—Lawrence, §§ 74-78—Phillimore, I. §§ 222-225—Twiss, I. §§ 113-139—Halleck, I. p. 154—Taylor, §§ 217-228—Wheaton, §§ 161-163—Bluntschli, §§ 278-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 252-255—Gareis, § 76—Liszt, § 10—Ullmann, § 92—Bonfils, No. 532—Despagnet, No. 378—Pradier-Fodéré, II. Nos. 781-787—Mérignhac, II. pp. 410-412—Rivier, I. § 12—Nys, II. pp. 1-3—Calvo, I. § 263—Fiore, I. Nos. 838-840—Martens, I. § 90—Heimbürger, "Der Erwerb der Gebietshoheit" (1888).

§ 209. Since States only and exclusively are subjects of the Law of Nations, it is obvious that, as far as the Law of Nations is concerned, States¹ solely can acquire State territory. But the acquisition of territory by an existing State and member of the Family of Nations must not be confounded, first, with the foundation of a new State, and, secondly, with the acquisition of such territory and sovereignty over it by private individuals or corporations as lies outside the dominion of the Law of Nations.

Who can
acquire
State
Territory?

(1) Whenever a multitude of individuals, living on or entering into such a part of the surface of the globe as does not belong to the territory of any member of the Family of Nations, constitute themselves as a State and nation on that part of the globe, a new State comes into existence. This State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is, as will be remembered from former

¹ There is no doubt that no full-Sovereign State is, as a rule, prevented by the Law of Nations from acquiring more territory than it already owns, unless some treaty arrangement precludes it from so

doing. As regards the question whether a neutralised State is, by its neutralisation, prevented from acquiring territory, see above, § 96, and below, § 215.

statements,¹ a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition.

(2) Not essentially different is the case in which a private individual or a corporation acquires land with sovereignty over it in countries which are not under the territorial supremacy of a member of the Family of Nations. The actual proceeding in all such cases is that all such acquisition is made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land. Acquisition of territory and sovereignty thereon in such cases takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied. If the individual or corporation which has made the acquisition requires protection by the Law of Nations, they must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the former Congo Free State,² or they must ask a member of the Family of Nations to acknowledge the acquisition as made on its behalf.³

Former
Doctrine
concern-
ing Acqui-
sition of
Territory.

§ 210. No unanimity exists among writers on the Law of Nations with regard to the modes of acquiring territory on the part of the members of the Family of Nations. The topic owes its controversial character to

¹ See above, § 71.

² See above, § 101. The case of Sir James Brooke, who acquired in 1841 Sarawak, in North Borneo, and established an independent State there, of which he became the Sovereign, may also be cited. Sarawak is under English protectorate, but the successor of Sir James

Brooke is still recognised as Sovereign.

³ The matter is treated with great lucidity by Heimbürger, pp. 44–77, who defends the opinion represented in the text against Sir Travers Twiss (I. Preface, p. x.; also in R.I. xv. p. 547, and xvi. p. 237) and other writers. See also Ullmann, § 93.

the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the (private property of the monarch) of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.¹ As nowadays, as far as International Law is concerned, every analogy to private property has disappeared from the conception of State territory, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory. It is obvious that under these circumstances the rules of Roman Law concerning the acquisition of private property can no longer be applied. Yet the fact that they have been applied in the past has left traces which can hardly be obliterated; and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts. But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis may be made use of.

§ 211. States as living organisms grow and decrease in territory. If the historical facts are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the different sections of its territory. One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a

What
Modes of
Acquisition of
Territory
there are.

¹ See above, § 168. The distinction between *imperium* and *dominium* in Seneca's *dictum* that "omnia rex imperio possidet, singuli dominio" was well known,

and Grotius, II. c. 3, § 4, quotes it, but the consequences thereof were nevertheless not deduced. (See Westlake, Chapters, pp. 129-133, and Westlake, I. pp. 84-88.)

fourth through occupation of no State's land. As regards a fifth section, a State may say that it has exercised its sovereignty over the same for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five modes of acquiring territory may be distinguished, namely: cession, occupation, accretion, subjugation, and prescription. Most writers recognise these five modes. Some, however, do not recognise prescription; some assert that accretion creates nothing else than a modification of the territory of a State; and some do not recognise subjugation at all, or declare it to be only a special case of occupation. It is for these reasons that some writers recognise only two or three¹ modes of acquiring territory. Be that as it may, all modes, besides the five mentioned, enumerated by some writers, are in fact not special modes, but only special cases of cession.² And whatever may be the value of the opinions of publicists, so much is certain that the practice of the States recognises cession, occupation, accretion, subjugation, and prescription as distinct modes of acquiring territory.

Original
and derivative
Modes of
Acquisition.

§ 212. The modes of acquiring territory are correctly divided according as the title they give is derived from the title of a prior owner State, or not. Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes.³

¹ Thus Gareis (§ 70) recognises cession and occupation only, whereas Heimbürger (pp. 106–110) and Holtzendorff (II. p. 254) recognise cession, occupation, and accretion only.

² See below, § 216. Such alleged special modes are sale, exchange, gift, marriage contract, testamentary disposition, and the like.

³ Lawrence (§ 74) enumerates conquest (subjugation) and prescription besides cession as derivative modes. This is, however, merely the consequence of a peculiar conception of what is called a derivative mode of acquisition.

XII

CESSION

Hall, § 35—Lawrence, § 76—Phillimore, I. §§ 252–273—Twiss, I. § 138—Walker, § 10—Halleck, I. pp. 154–157—Taylor, § 227—Moore, I. §§ 83–86—Bluntschli, §§ 285–287—Hartmann, § 61—Heffter, §§ 69 and 182—Holtzendorff in Holtzendorff, II. pp. 269–274—Gareis, § 70—Liszt, § 10—Ullmann, §§ 97–98—Bonfils, Nos. 364–371—Mérignhac, II. pp. 487–497—Despagnet, Nos. 381–391—Pradier-Fodéré, II. Nos. 817–819—Rivier, I. pp. 197–217—Nys, II. pp. 8–31—Calvo, I. § 266—Fiore, II. §§ 860–861, and Code, No. 1053—Martens, I. § 91—Heimburger, “Der Erwerb der Gebietshoheit” (1888), pp. 110–120.

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules¹ for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.² But if such municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of States or Governments as violate these restrictions are not binding.³

Concep-
tion of
cession of
State
Territory.

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States concern the Law of Nations. Cessions of territory made to private persons and to corporations⁴ by native tribes or by States outside the dominion of the Law of Nations

Subjects
of cession.

¹ See above, § 168.

² See above, § 21.

³ See below, § 497.

⁴ See above, § 209, No. 2.

do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States¹ which are members of the Family of Nations. On the other hand, cession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family.²

Object of
cession.

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land.³

The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative,⁴ although the Powers certainly can exercise an intervention by right. On the other hand, a permanently neutralised State could not, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the Powers.⁵ Nor could a State under suzerainty or protectorate cede a part or the whole of its territory to a third State without the consent of the superior State. Thus, the Ionian Islands could not in 1863 have merged in Greece without the consent of Great Britain, which exercised a protectorate over these islands.

Form of
cession.

§ 216. The only form in which a cession can be effected

¹ See below, §§ 221 and 222.

² See above, § 103.

³ See above, §§ 175 and 185.

⁴ Thus in 1860 Sardinia ceded her neutralised provinces of Chablais

and Faucigny to France. See above, § 207.

⁵ See above, § 96, and the literature there quoted.

is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be one with or without compensation.

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions. Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate.

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes. Thus Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a gift, and some weeks afterwards France on her part ceded Venice to Italy. The Duchy of Courland ceded in 1795 its whole territory to and voluntarily merged thereby in Russia, in the same way the then Free Town of Mulhouse merged in France in 1798, the Congo Free State in Belgium in 1908, and the Empire of Korea in Japan in 1911.

Cessions have in the past often been effected by transactions which are analogous to transactions in private business life. As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary dispositions*.¹ In the interest of frontier regulations, but also for other purposes, *exchanges* of territory frequently take place. Sale of territory is quite usual; as late as

¹ Phillimore, I. §§ 274-276, enumerates many examples of such cession. The question whether the monarch of a State under absolute

government could nowadays by a testamentary disposition cede territory to another State must, I believe, be answered in the affirmative.

1868 Russia sold her territory in America to the United States for 7,200,000 dollars, and in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas. Pledge and lease are also made use of. Thus, the then Republic of Genoa pledged Corsica to France in 1768, Sweden pledged Wismar to Mecklenburg in 1803; China¹ leased in 1898 Kiaochau to Germany,² Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain,³ and Port Arthur to Russia.

Whatever may be the motive and the purpose of the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new sovereign with all the international obligations⁴ locally connected with the territory (*Res transit cum suo onere*, and *Nemo plus iuris transferre potest, quam ipse habet*).

Tradition
of the
ceded
Territory.

§ 217. The treaty of cession must be followed by actual tradition of the territory to the new owner State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition,⁵ the cession being completed by ratification of the treaty of cession, and the capability of the new owner to cede the acquired territory to a third State at once without taking actual possession of it.⁶ But of course the new owner State cannot

¹ See above, § 171, No. 3. Cession may also take place under the disguise of an agreement according to which territory comes under the "administration" or under the "use, occupation, and control" of a foreign State. See above, § 171, Nos. 2 and 4.

² See Martens, N.R.G. 2nd Ser. XXX. (1904), p. 326.

³ See Martens, N.R.G. 2nd Ser. XXXII. (1905), pp. 89 and 90.

⁴ How far a succession of States

takes place in the case of cession of territory has been discussed above, § 84.

⁵ This is controversial. Many writers—see, for instance, Rivier, I. p. 203—oppose the opinion presented in the text.

⁶ Thus France, to which Austria ceded in 1859 Lombardy, ceded this territory on her part to Sardinia without previously having actually taken possession of it.

exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory.

§ 218. As a rule, no third Power has the right of *veto* with regard to a cession of territory. Exceptionally, however, such right may exist. It may be that a third Power has by a previous treaty acquired a right of pre-emption concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not-permanently neutralised State.¹ And the Powers have certainly the right of *veto* in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State.² But even where no right of *veto* exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory as endanger the balance of power or are otherwise of vital importance.³ And a strong State will practically always interfere in case a cession of such a kind as menaces its vital interests is agreed upon. Thus, when in 1867 the reigning King of Holland proposed to sell Luxemburg to France, the North German Confederation intervened, and the cession was not effected, but Luxemburg became permanently neutralised.

Veto of
third
Powers.

§ 219. As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects⁴ of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory lose their old citizenship and are handed over to a new Sovereign whether they like it or not, has created a movement in favour of the

Plebiscite
and op-
tion.

¹ See above, § 215.

² See above, §§ 209 and 215.

³ See above, § 136.

⁴ See Keith, "The Theory of State

Succession, &c." (1907), pp. 42-45 ; Cogordan, "La Nationalité" (1890), pp. 317-400 ; Moore, III. § 379.

claim that no cession shall be valid until the inhabitants have by a plebiscite¹ given their consent to the cession. And several treaties² of cession concluded during the nineteenth century stipulate that the cession shall only be valid provided the inhabitants consent to it through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite.³ The necessities of international policy may now and then allow or even demand such a plebiscite, but in most cases they will not allow it.

The hardship of the inhabitants being handed over to a new Sovereign against their will can be lessened by a stipulation in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration. Many treaties of cession concluded during the second half of the nineteenth century contain this stipulation. But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State.

The option to emigrate within a certain period, which is frequently stipulated in favour of the inhabitants of ceded territory, is another means of averting the charge that inhabitants are handed over to a new Sovereign against their will. Thus article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-German war, stipulated that the French inhabitants of the

¹ See Stoerk, "Option und Plebiscite" (1879); Rivier, I. p. 204; Freudenthal, "Die Volksabstimmung bei Gebietsabtretungen und Eroberungen" (1891); Bonfils, No. 570; Despagnet, No. 391; Ullmann, § 97.

² See Rivier, I. p. 210, where all these treaties are enumerated.

³ Although Grotius (II. c. VI. § 4) taught this to be necessary.

ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil.¹

XIII

OCCUPATION

Hall, §§ 32-34—Westlake, I. pp. 96-111, 119-133—Lawrence, § 74—Phillimore, I. §§ 236-250—Twiss, I. §§ 118-126—Halleck, I. p. 154—Taylor, §§ 221-224—Walker, § 9—Wharton, I. § 2—Moore, I. §§ 80-81—Wheaton, §§ 165-174—Bluntschli, §§ 278-283—Hartmann, § 61—Heffter, § 70—Holtzendorff in Holtzendorff, II. pp. 255-266—Gareis, § 70—Liszt, § 10—Ullmann, §§ 93-96—Bonfils, Nos. 536-563—Despagnet, Nos. 329-399—Mérignhac, II. pp. 419-487—Pradier-Fodéré, II. Nos. 784-802—Rivier, I. pp. 188-197—Nys, II. pp. 47-108—Calvo, I. §§ 266-282—Fiore, II. Nos. 841-849, and Code, Nos. 1054-1067—Martens, I. § 90—Tartarin, "Traité de l'occupation" (1873)—Westlake, Chapters, pp. 155-187—Heimbürger, "Der Erwerb der Gebietsheheit" (1888), pp. 103-155—Salomon, "L'occupation des territoires sans maître" (1889)—Jèze, "Étude théorique et pratique sur l'occupation, &c." (1896)—Macdonell in the *Journal of the Society of Comparative Legislation*, New Series, I. (1899), pp. 276-286—Waultrin in R.G. XV. (1908), pp. 78, 185, 401.

§ 220. Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation² chiefly in so far as the conquered and afterwards annexed territory has hitherto belonged to another State. Again, occupation differs from cession in so far as through cession the acquiring State receives sovereignty over the respective territory from the former owner State. In contradistinction to cession, which is a derivative mode of

Concep-
tion of
Occupation.

¹ The important question whether subjects of the ceding States who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must, I think, be answered in the negative, unless special treaty arrangements stipulate the contrary. Therefore, Frenchmen born in Alsace but domiciled at the

time of the cession in Great Britain, would not have lost their French citizenship through the cession to Germany but for article 1, part 2, of the additional treaty of Dec. 11, 1871, to the Peace Treaty of Frankfurt. (Martens, N.R.G. XX. p. 847.) See Bonfils, No. 427, and Cogordan, "La Nationalité, &c." (1890), p. 361.

² See below, § 236.

acquisition, occupation is therefore an original mode. And it must be emphasised that occupation can only take place by and for a State;¹ it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

Object of
Occupation.

§ 221. Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as *e.g.* an island, or inhabited by natives whose community is not to be considered as a State. Even civilised individuals may live and have private property on a territory without any union by them into a State proper which exercises sovereignty over such territory. And natives may live on a territory under a tribal organisation which need not be considered a State proper. But a part or the whole of the territory of any State, even although such State is entirely outside the Family of Nations, is not a possible object of occupation, and it can only be acquired through cession² or subjugation. On the other hand, a territory which belonged at one time to a State but has been afterwards abandoned, is a possible object for occupation on the part of another State.³

Although the Open Sea is free and is, therefore, not the object of occupation, the subsoil⁴ of the bed of the Open Sea may become the object of occupation through driving mines and piercing tunnels from the coast.⁵

Occupation how effected.

§ 222. Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of and establishing an administration over the territory in the name of and for the acquiring State.

¹ See above, § 209.

² See above, § 214.

³ See below, §§ 228 and 247.

⁴ See below, §§ 287c and 287d.

⁵ When, in 1909, Admiral Peary reached the North Pole and hoisted the flag of the United States the question was discussed whether the

North Pole could be the object of occupation. The question must, I believe, be answered in the negative since there is no land on the Pole. See Scott in A.J. III. (1909), pp. 928-941 and Baloh in A.J. IV. (1910), pp. 265-275.

Occupation thus effected is real occupation, and, in contradistinction to fictitious occupation, is named effective occupation. Possession and administration are the two essential facts that constitute an effective occupation.

(1) The territory must really be taken into possession by the occupying State. For this purpose it is necessary that the respective State should take the territory under its sway (*corpus*) with the intention to acquire sovereignty over it (*animus*). This can only be done by a settlement on the territory accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. The necessary formal act is usually performed either by the publication of a proclamation or by the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is irrelevant whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand the meaning, such agreements have a moral value only.¹

(2) After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If within a reasonable time after the act of taking possession the possessor does not establish some responsible authority which exercises governing functions,

¹ If an agreement with natives were legally important, the respective territory would be acquired by cession, and not by occupation. But although it is nowadays quite

usual to obtain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law; see above, § 214.

there is then no effective occupation, since in fact no sovereignty of a State is exercised over the territory.

Inchoate
Title of
Discovery.

§ 223. In former times the two conditions of possession and administration which now make the occupation effective were not considered necessary for the acquisition of territory through occupation. In the age of the discoveries, States maintained that the fact of discovering a hitherto unknown territory was sufficient reason for considering it as acquired through occupation by the State in whose service the discoverer made his explorations. And although later on a real taking possession of the territory was considered necessary for its occupation, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation as necessary,¹ and it was not until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it "acts as a temporary bar to occupation by another State"² within such a period as is reasonably sufficient for effectively occupying the discovered territory. If such period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, such inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation.

Notifica-
tion of
Occupation to
other
Powers.

§ 224. No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity. But as regards all future occupations on the *African* coast the Powers assembled at the Berlin Congo Conference in 1884-1885 have by article 34 of the General Act³ of this Conference

¹ See Vattel, I. § 208.

² Thus Hall, § 32.

³ See Martens, N.R.G. 2nd Ser. X. p. 426.

stipulated that occupation shall be notified to one another, so that such notification is now a condition of the validity of certain occupations in Africa. And there is no doubt that in time this rule will either by custom or by treaty be extended from occupations on the African coast to occupations everywhere else.

§ 225. Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to reach over so much territory as is effectively occupied. In practice, however, the interested States have neither in the past nor in the present acted in conformity with such a rule; on the contrary, they have always tried to attribute to their occupation a much wider area. Thus it has been maintained that an effective occupation of the (land at the mouth of a river) is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run up to the very crest of the watershed.¹ Again, it has been maintained that, when a (coast line has been effectively occupied, the extent of the occupation reaches up to the watershed) of all such rivers as empty into the coast line.² And it has, thirdly, been asserted that effective occupation of a territory extends the sovereignty of the possessor also (over neighbouring territories) as far as it is necessary for the integrity, security, and defence of the really occupied land.³ But all these and other fanciful assertions have no basis to rest upon. In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective. How far it is effective is a question of the special case. It is obvious

Extent of
Occupation.

¹ Claim of the United States in the Oregon Boundary dispute (1827) with Great Britain. See Twiss, I. §§ 126 and 127, and his "The Oregon Question Examined" (1846); Phillimore, I. § 250; Hall, § 34.

² Claim of the United States in

their dispute with Spain concerning the boundary of Louisiana (1803), approved of by Twiss, I. § 125.

³ This is the so-called "right of contiguity," approved of by Twiss, I. §§ 124 and 131.

that when the agent of a State takes possession of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation. Everything depends, therefore, upon the fact how far around the settlement or settlements the established responsible authority that governs the territory in the name of the possessor succeeds in gradually extending the established sovereignty. The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, and many other facts, can show how far round the settlements the possessor is really able to assert the established authority. But it will always be difficult to mark exactly in this way the boundary of an effective occupation, since naturally the tendency prevails to extend the sway constantly and gradually over a wider area. It is, therefore, a well-known fact that disputes concerning the boundaries of occupations can only rarely be decided on the basis of strict law; they must nearly always be compromised, whether by a treaty or by arbitration.¹

Protec-
torate as
Precursor
of Occupa-
tion.

§ 226. The growing desire to acquire vast territories as colonies on the part of States unable at once to occupy effectively such territories has, in the second half of the nineteenth century, led to the contracting of agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs commit themselves to the "protectorate" of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term designating the relation that exists between a strong and a weak State through a treaty by which the weak State surrenders itself into the protection of the strong and transfers to the latter

¹ The Institute of International Law, in 1887, at its meeting in Lausanne, adopted a "Projet de déclaration internationale relatif aux

occupations de territoires," comprising ten articles; see *Annuaire*, X. p. 201.

the management of its more important international relations.¹ Neither can they be compared with the protectorate of members of the Family of Nations exercised over such non-Christian States as are outside that family,² because the respective chiefs of natives are not the heads of States, but heads of tribal communities only. Such agreements, although they are named "Protectorates," are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are preparations and precursors of future occupations.

§ 227. The uncertainty of the extent of an occupation and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, the "Hinterland," of an occupied territory, has led several States which have colonies in Africa to secure for themselves "spheres of influence" by international treaties with other interested Powers. Spheres of influence are therefore the names of such territories as are exclusively reserved for future occupation on the part of a Power which has effectively occupied adjoining territories. In this way disputes are avoided for the future, and the interested Powers can gradually extend their sovereignty over vast territories without coming into conflict with other Powers. Thus, to give some examples, Great Britain has concluded treaties regarding spheres of influence with Portugal³ in 1890, with Italy⁴ in 1891, with Germany⁵ in 1886 and 1890, and with France⁶ in 1898.⁷

Spheres of influence.

¹ See above, §§ 92 and 93.

² See above, § 94.

³ See Martens, N.R.G. 2nd Ser. XVIII. p. 558.

⁴ See Martens, N.R.G. 2nd Ser. XVIII. p. 175.

⁵ See Martens, N.R.G. 2nd Ser. XII. p. 298, and XVI. p. 895.

⁶ See Martens, N.R.G. 2nd Ser. XXIX. p. 116.

⁷ Protectorates and Spheres of Influence are exhaustively treated in Hall, "Foreign Powers and Jurisdiction of the British Crown," §§ 92-100; but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes.

Conse-
quences
of Occu-
pation.

§ 228. As soon as a territory is occupied by a member of the Family of Nations, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law. No other Power can acquire it hereafter through occupation, unless the present possessor has either intentionally withdrawn from it or has been successfully driven away by the natives without making efforts, or without capacity, to re-occupy it.¹ On the other hand, the Power which now exercises sovereignty over the occupied territory is hereafter responsible for all events of international importance on the territory. Such Power has in especial to keep up a certain order among the native tribes in order to restrain them from acts of violence against neighbouring territories, and has eventually to punish them for such acts.

A question of some importance is how far occupation affects private property of the inhabitants of the occupied territory. As according to the modern conception of State territory the latter is not identical with private property of the State, occupation brings a territory under the sovereignty only of the occupying State, and therefore in no wise touches or affects existing private property of the inhabitants. In the age of the discoveries, occupation was indeed considered to include a title to property over the whole occupied land, but nowadays this can no longer be maintained. Being now their sovereign, the occupying State may impose any burdens it likes on its new subjects, and may, therefore, even confiscate their private property; but occupation as a mode of acquiring territory does not of itself touch or affect private property thereon. If the Municipal Law of the occupying State does give a title to private property over the whole occupied land, such title is not based on International Law.

¹ See below, § 247.

XIV

ACCRETION

Grotius, II. c. 8, §§ 8-16—Hall, § 37—Lawrence, § 75—Phillimore, I. §§ 240-241—Twiss, I. §§ 131 and 154—Moore, I. § 82—Bluntschli, §§ 294-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 266-268—Gareis, § 20—Liszt, § 10—Ullmann, § 92—Bonfils, No. 533—Despagnet, No. 387—Pradier-Fodéré, II. Nos. 803-816—Rivier, I. pp. 179-180—Nys, II. pp. 3-7—Calvo, I. § 266—Fiore, II. No. 852, and Code, Nos. 1068-1070—Martens, I. § 90—Heimbürger, "Der Erwerb der Gebietshoheit" (1888), p. 107.

§ 229. Accretion is the name for the increase of land through new formations. Such new formations may be a modification only of the existing State territory, as, for instance, where an island rises within such river or a part of it as is totally within the territory of one and the same State; and in such case there is no increase of territory to correspond with the increase of land.) On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt. And it is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. Accretion must, therefore, be considered as a mode of acquiring territory.

Concep-
tion of
Accretion.

X

§ 230. New formations through accretion may be artificial or natural. They are artificial if they are the outcome of human work. They are natural if they are produced through operation of nature. And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, new-born islands, and abandoned river beds.

Different
kinds of
Accretion.

§ 231. Artificial formations are embankments, break-waters, dykes, and the like, built along the river or the coast-line of the sea. As such artificial new formations

Artificial
Forma-
tions.

along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage¹ of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring State. But every State may construct such artificial formations as far into the sea beyond the low-water mark as it likes, and thereby gain considerably in land and also in territory, since the extent of the at least three miles wide maritime belt is now to be measured from the extended shore.

Alluvions.

§ 232. Alluvion is the name for an accession of land washed up on the sea-shore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the land and also the territory of a State may be considerably enlarged. For, if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore. And, if the alluvion takes place on the one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,² may thereby be extended into former territory of the other riparian State.

Deltas.

§ 233. Similar to alluvions are Deltas. Delta is the name for a tract of land at the mouth of a river shaped like the Greek letter Δ , which land owes its existence to a gradual deposit by the river of sand, stones, and

¹ See above, § 127.

² See above, § 199, No. 1.

earth on one particular place at its mouth. As the Deltas are continually increasing, the accession of land they produce may be very considerable, and such accession is, according to the Law of Nations, considered an accretion to the land of the State to whose territory the mouth of the respective river belongs, although the Delta may be formed outside the territorial maritime belt. It is evident that in the latter case an increase of territory is the result, since the at least three miles wide maritime belt is now to be measured from the shore of the Delta.

§ 234. The same and other natural processes which create alluvions on the shore and banks, and Deltas at the mouths of rivers, lead to the birth of new islands. If they rise on the High Seas outside the territorial maritime belt, they are no State's land, and may be acquired through occupation on the part of any State. But if they rise in rivers, lakes, and within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land. It is for this reason that such new islands in boundary rivers as rise within the boundary line of one of the riparian States accrue to the land of such State, and that, on the other hand, such islands as rise upon the boundary line are divided into parts by it, the respective parts accruing to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the littoral State, and the extent of the maritime belt is now to be measured from the shore of the new-born island.

New-born
Islands.

An illustrative example is the case¹ of the *Anna*. In 1805, during war between Great Britain and Spain, the British privateer *Minerva* captured the Spanish-vessel *Anna* near the mouth of the River Mississippi. When brought before the British Prize Court, the United

¹ See 5 C. Rob. 373.

States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud-islands composed of earth and trees drifted down into the sea.

Abandoned
River-
beds.

§ 235. It happens sometimes that a river abandons its bed entirely or dries up altogether. If such river was a boundary river, the abandoned bed is now the natural boundary. But often the old boundary line cannot be ascertained, and in such cases the boundary line is considered to run through the middle of the abandoned bed, and the portions *ipso facto* accrue to the land of the riparian States, although the territory of one of these States may become thereby enlarged, and that of the other diminished.

XV

SUBJUGATION

Vattel, III. §§ 199–203—Hall, §§ 204–205—Lawrence, § 77—Halleck, II. pp. 467–498—Taylor, § 220—Walker, § 11—Wheaton, § 165—Moore, I. § 87—Bluntschli, §§ 287–289, 701–702—Heffter, § 178—Liszt, § 10—Ullmann, §§ 92 and 97—Bonfils, No. 535—Despagnet, Nos. 387–390—Rivier, I. pp. 181–182, II. 436–441—Nys, II. pp. 40–46—Calvo, V. § 3117, 3118—Fiore, II. No. 863, III. No. 1693, and Code, Nos. 1078–1081—Martens, I. § 91—Holtzendorff, “Eroberung und Eroberungsrecht” (1871)—Heimbürger, “Der Erwerb der Gebietshegemonie” (1888), pp. 121–132—Westlake in *The Law Quarterly Review*, XVII. (1901), p. 392.

Concep-
tion of
Conquest
and of
Subjuga-
tion.

§ 236. Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes through conquest for the time under the sway of the conqueror. Conquest is only a

mode of acquisition if the conqueror, after having firmly established the conquest, formally annexed the territory. (Such annexation makes the enemy State cease to exist and thereby brings the war to an end. And as such ending of war is named subjugation,) it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring territory.¹ It is, however, quite usual to speak of conquest as a title, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and makes afterwards the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.²

§ 237. Some writers³ maintain that subjugation is only a special case of occupation, because, as they assert, through conquest the enemy territory becomes no State's land and the conqueror can acquire it by turning his military occupation into absolute occupation. Yet this opinion cannot be upheld, because military occupation, which is conquest, in no way makes enemy territory no State's land. Conquered enemy territory, although actually in possession and under the sway of the conqueror, (remains legally under the sovereignty of the enemy) until through annexation it comes under the sovereignty of the conqueror. (Annexation turns the conquest into subjugation.) It is the very annexation which *uno actu* makes the vanquished State cease to exist and brings the territory under the conqueror's sovereignty. Thus the subjugated territory has not for one moment been no State's land, but comes from the enemy's into the conqueror's sovereignty, although not through cession, but through annexation.

Subjugation in Contradistinction to Occupation.

¹ Concerning the distinction between conquest and subjugation, see below, vol. II. § 264.

² See above, §§ 216 and 219.

³ Holtzendorff, II. p. 255; Heimbürger, p. 128; Salomon, p. 24.

Justifica-
tion of
Subjuga-
tion as a
Mode of
Acquisi-
tion.

§ 238. As long as a Law of Nations has been in existence, the States as well as the vast majority of writers have recognised subjugation as a mode of acquiring territory. Its justification lies in the fact that war is a contention between States for the purpose of overpowering one another. States which go to war know beforehand that they risk more or less their very existence, and that it may be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons. One must hope that the time will come when war will disappear entirely, but, as long as war exists, subjugation will also be recognised. If some writers¹ refuse to recognise subjugation at all as a mode of acquiring territory, they show a lack of insight into the historical development of States and nations.²

Subjuga-
tion of the
whole or
of a part
of Enemy
Territory.

§ 239. Subjugation is as a rule a mode of acquiring the entire enemy territory. The actual process is regularly that the victor destroys the enemy military forces, takes possession of the enemy territory, and then annexes it, although the head and the Government of the extinguished State might have fled, might protest, and still keep up a claim. Thus after the war with Austria and her allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Maine; and Great Britain subjugated in 1900 the territories of the Orange Free State and the South African Republic.

But it is possible, although it will nowadays hardly occur, for a State to conquer and annex a part of enemy territory, whether the war ends by a Treaty of Peace

¹ Bonfils, No. 535; Fiore, II. No. 863, III. No. 1693, and Code N. See also Despagnet, Nos. 387-390.

² It should be mentioned that the Pan-American Congress at Washing-

ton, 1890, passed a resolution that conquest should hereafter not be a mode of acquisition of territory in America; see Moore, I. § 87.

in which the vanquished State, without ceding the conquered territory, submits silently¹ to the annexation, or by simple cessation of hostilities.²

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war. Such a conquest, although the conqueror may intend to keep the conquered territory and therefore annex it, is not a title as long as the war has not terminated either actually through simple cessation of hostilities or through a Treaty of Peace. Therefore, the practice, which sometimes prevails, of annexing a conquered part of enemy territory during war cannot be approved. Concerning subjugation either of the whole or of a part of enemy territory, it must be asserted that annexation gives a title only after a *firmly established* conquest. So long as war continues, conquest is not firmly established.³

§ 240. Although subjugation is an original mode of acquisition, since the sovereignty of the new acquirer is not derived from that of the former owner State, the new owner State is nevertheless the successor of the former owner State as regards many points which have been discussed above (§ 82). It must be specially mentioned that, as far as the Law of Nations is concerned, the subjugator does not acquire the private property of the inhabitants of the annexed territory. Being now their Sovereign, the subjugating State may indeed impose any burdens it pleases on its new subjects, it may even confiscate their private property, since a Sovereign State can do what it likes with its subjects, but subjugation itself does not by International Law touch or affect private property.

Consequences of Subjugation.

¹ See below, vol. II. § 273.

² See below, vol. II. § 263.

³ See below, vol. II. § 60, concerning guerilla war after the

termination of real war. Many writers, however, deny that a conquest is firmly established as long as guerilla war is going on.

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* by the subjugation¹ subjects of the subjugator. But the national status of such enemy subjects as are domiciled abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is matter of dispute. Some writers maintain that these individuals do in spite of their absence become subjects of the subjugator, others emphatically deny it. Whereas the practice of the United States of America seems to be in conformity with the latter opinion,² the practice of Prussia in 1866 was in conformity with the former. Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George V. of Hanover, who left Hanover with his King before the annexation in 1866 and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this Court decided that the accused had become a Prussian subject through the annexation of Hanover.³ I believe that a distinction must be made between those individuals who leave the country *before* and those who leave it *after* annexation. The former are not under the sway of the subjugator at the time of annexation, and, since the personal supremacy of their home State terminates with the latter's extinction through annexation, they would seem to be outside the sovereignty of the subjugator. But those individuals who leave the country *after* annexation leave it at a

¹ See *Hall v. Campbell* (1774), 1 Cowper 1208, and *United States v. Repentigny* (1866), 5 Wallace, 211. The case is similar to that of cession: see above, § 219; Keith, "The Theory of State Succession" (1907), pp. 45 and 48; Moore, III. § 379.

² See Halleck, II. p. 476.

³ See Halleck, II. p. 476, on the one hand, and, on the other, Rivier, II. p. 436. Valuable opinions of Zachariae and Neumann, who deny that Count Platen was a Prussian subject, are printed in the "Deutsche Strafrechts-Zeitung" (1868), pp. 304-320.

time when they have become subjects of the new Sovereign, and they therefore remain such subjects even after they have left the country, for there is no rule of the Law of Nations in existence which obliges a subjugator to grant the privilege of emigration¹ to the inhabitants of the conquered territory.

Different from the fact that enemy subjects become through annexation subjects of the subjugator is the question what position they acquire within the subjugating State. This question is one of Municipal, and not of International Law. The subjugator can, if he likes, allow them to emigrate and to renounce their newly acquired citizenship, and the Municipal Law of the subjugating State can put them in any position it likes, can in especial grant or refuse them the same rights as those which its citizens by birth enjoy.

§ 241. Although subjugation is an original mode of acquiring territory and no third Power has as a rule² a right of intervention, the conqueror has not in fact an unlimited possibility of annexation of the territory of the vanquished State. When the balance of power is endangered or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions. But it must be emphasised that the validity of the title of the subjugator does not depend upon recognition on the part of other Powers. And a mere protest of a third Power is of no legal weight either.

Veto of
third
Powers.

¹ Both Westlake and Halleck state that the inhabitants *must* have a free option to stay or leave the country; but there is no rule of International Law which imposes the duty upon a subjugator to grant this option.

² But this rule has exceptions, as in the case of a State whose independence and integrity have been guaranteed by one or more Powers.

XVI

PRESCRIPTION

Grotius, II. c. 4—Vattel, I. §§ 140–151—Hall, § 36—Westlake, I. pp. 92–94—Lawrence, § 78—Phillimore, I. §§ 251–261—Twiss, I. § 129—Taylor, §§ 218–219—Walker, § 13—Wheaton, § 164—Moore, I. § 88—Bluntschli, § 290—Hartmann, § 61—Heffter, § 12—Holtzendorff in Holtzendorff, II. p. 255—Ullmann, § 92—Bonfils, No. 534—Mérignhac, II. p. 412—Despagnet, No. 380—Pradier-Fodéré, II. Nos. 820–829—Rivier, I. pp. 182–184—Nys, II. pp. 34–39—Calvo, I. §§ 264–265—Fiore, II. Nos. 850–851, and Code, Nos. 1074–1077—Martens, I. § 90—G. F. Martens, §§ 70–71—Bynkershoek, “Quaestiones juris publici,” IV. c. 12—Heimbürger, “Der Erwerb der Gebietshoheit” (1888), pp. 140–155—Ralston in A.J. IV. (1910), pp. 133–144.

Concep-
tion of
Prescrip-
tion.

§ 242. Since the existence of a science of the Law of Nations there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted the same law's *immemorial* prescription¹ for the Law of Nations. But whereas a good many writers² still defend that standpoint, others³ reject prescription altogether. Again, others⁴ go beyond Grotius and his followers and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.

This opinion would indeed seem to be correct, because it recognises theoretically what actually goes on in practice. There is no doubt that in the practice of the members of the Family of Nations a State is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided only the possessor has

¹ See Grotius, II. c. 4, §§ 1, 7, 9.

² See, for instance, Heffter, § 12; Martens, § 90.

³ G. F. Martens, § 71; Klüber, §§ 6 and 125; Holtzendorff, II. p. 255; Ullmann, § 92.

⁴ Vattel, II. § 147; Wheaton, § 165; Phillimore, I. § 259; Hall, § 36; Bluntschli, § 290; Pradier-Fodéré, II. No. 825; Bonfils, No. 534, and many others.

been in undisturbed possession for such a length of time as is necessary to create the general conviction among the members of the Family of Nations that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law because the latter required *bona-fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona-fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition¹ of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order*. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order.

§ 243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such

Prescription how effected.

¹ This is pointed out with great lucidity by Heimbürger, pp. 151–155; he rejects, however, prescription as a mode of acquiring territory, maintaining that there is

a customary rule of International Law in existence according to which recognition can make good originally wrongful possession.

protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law but of fact. The question, for instance, whether, although the three partitions of Poland were wrongful and unlawful acts, Prussia, Austria, and Russia have now a good title by prescription to hold territories which were formerly Polish must, I doubt not, be answered in the affirmative. For all the members of the Family of Nations have now silently acquiesced in the present condition of things, although as late as 1846 Great Britain and France protested against the annexation of the Republic of Cracow on the part of Austria. In spite of the fact that the Polish nation has not yet given up its hope of seeing a Polish State re-established on the former Polish territory, the general conviction among the members of the Family of Nations is that the present condition of things is in conformity with international order. When, to give another example, a State which originally held an island *mala fide* under the title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order. These examples show why a certain number of years¹

¹ Vattel (II. § 151) suggests that the members of the Family of Nations should enter into an agreement stipulating the number of years necessary for prescription, and David Dudley Field proposes the

following rule (52) in his *Outlines of an International Code*: "The uninterrupted possession of territory or other property for fifty years by a nation excludes the claim of every other nation."

cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere run of time¹ at work to create the conviction on the part of the members of the Family of Nations that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.

XVII

LOSS OF STATE TERRITORY

Hall, § 34—Phillimore, I. §§ 284–295—Moore, I. §§ 89 and 90—Holtzendorff in Holtzendorff, II. pp. 274–279—Gareis, § 70—Liszt, § 10—Ullmann, § 101—Pradier-Fodéré, II. Nos. 850–852—Rivier, I. § 13—Fiore, II. No. 865—Martens, I. § 92.

§ 244. To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction, operation of nature, subjugation, prescription. But there is a sixth mode of losing territory—namely, revolt. No special details are necessary with regard to loss of territory through subjugation, prescription, and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in strict law, nothing else than cessions² of territory. But operation of nature, revolt, and dereliction must be specially discussed.

Six modes
of losing
State
Territory.

¹ Heffter's (§ 12) dictum, "Hundert Jahre Unrecht ist noch kein Tag Recht" is met by the fact that it is not the operation of time alone,

but the co-operation of other circumstances and influences which creates the title by prescription.

² See above, §§ 171 and 216.

Operation
of Nature.

§ 245. Operation of nature as a mode of losing corresponds to accretion as a mode of acquiring territory. Just as through accretion a State may become enlarged, so it may become diminished through the disappearance of land and other operations of nature. And the loss of territory through operation of nature takes place *ipso facto* by such operation. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the respective littoral State is hereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and covers now part of the land on the bank from which such piece became detached, the territory of one of the riparian States may decrease through the boundary line being *ipso facto* transferred to the present middle or mid-channel of the river.

Revolt.

§ 246. Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.¹ Revolt followed by secession has, as history teaches, frequently been a cause of loss of territory. Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903. The question at what time a loss of territory through revolt is consummated cannot be answered once for all, since no hard-and-fast rule can be laid down regarding the time when it can be said that a

¹ The possible case where a province revolts, secedes from the mother country, and, after having successfully defended itself against the attempts of the latter to re-

conquer it, unites itself with the territory of another State, is a case of merger by cession of the whole territory.

State broken off from another has established itself safely and permanently. The matter has, as will be remembered, been treated above (§ 74), in connection with recognition. It may well happen that, although such a seceded State is already recognised by a third Power, the mother country does not consider the territory to be lost and succeeds in reconquering it.

§ 247. Dereliction as a mode of losing corresponds to occupation as a mode of acquiring territory. Dereliction frees a territory from the sovereignty of the present owner State. Dereliction is effected through the owner State's complete abandonment of the territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation¹ requires, first, the actual taking into possession (*corpus*) of territory and, secondly, the intention (*animus*) to acquire sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention to give up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able and makes efforts to retake possession. It is only when a territory is really derelict that any State may acquire it through occupation.² History knows of several such cases. But very often, when such occupation of derelict territory occurs, the former owner protests and tries to prevent the new occupier from acquiring it. The cases of the island of Santa Lucia and of the Delagoa Bay may be quoted as illustrations :—

(a) In 1639 Santa Lucia, one of the Antilles Islands, was occupied by England, but in the following year

¹ See above, § 222.

² See above, § 228.

the English settlers were massacred by the natives. No attempt was made by England to retake the island, and France, considering it no man's land, took possession of it in 1650. In 1664 an English force under Lord Willoughby attacked the French, drove them into the mountains, and held the island until 1667, when the English withdrew and the French returned from the mountains. No further step was made by England to retake the island, but she nevertheless asserted for many years to come that she had not abandoned it *sine spe redeundi*, and that, therefore, France in 1650 had no right to consider it no man's land. Finally, however, England resigned her claims by the Peace Treaty of Paris of 1763.¹

(b) In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay, which Portugal claimed as part of the territory owned by her at the bay, maintaining that the chiefs concerned were rebels. The dispute was not settled until 1875, when the case was submitted to the arbitration of the President of France. The award was given in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered as abandonment of a territory over which Portugal had exercised sovereignty for nearly three hundred years.²

¹ See Hall, § 34, and Moore, I. § 89.

² See Hall, § 34. The text of the award is printed in Moore, "Arbitrations," V. p. 4984.

CHAPTER II

THE OPEN SEA

I

RISE OF THE FREEDOM OF THE OPEN SEA

Grotius, II. c. 2, § 3—Pufendorf, IV. c. 5, § 5—Vattel, I. §§ 279–286—Hall, § 40—Westlake, I. pp. 161–162—Phillimore, I. §§ 172–179—Taylor, §§ 242–246—Walker, Science, pp. 163–171—Wheaton, §§ 186–187—Hartmann, § 64—Heffter, § 73—Stoerk in Holtzendorff, II. pp. 483–490—Bonfils, Nos. 573–576—Despagnet, No. 401—Pradier-Fodéré, II. Nos. 871–874—Nys, II. pp. 132–139—Mérignhac, II. pp. 498–505—Calvo, I. §§ 347–352—Fiore, II. Nos. 718–726—Martens, I. § 97—Perels, § 4—Azuni, “Dritto maritimo” (1796), I, c. I. Article III.—Cauchy, “Le droit maritime international considéré dans ses origines,” 2 vols. (1862)—Nys, “Les origines du droit international” (1894), pp. 377–388—Castel, “Du principe de la liberté des mers” (1900), pp. 1–15—Fulton, “The Sovereignty of the Seas” (1911), pp. 1–56.

§ 248. In antiquity and the first half of the Middle Ages navigation on the Open Sea was free to everybody. According to Ulpianus,¹ the sea is open to everybody by nature, and, according to Celsus,² the sea, like the air, is common to all mankind. Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached to the pronouncement of Antoninus Pius, Roman Emperor from 138 to 161:—“Being³ the Emperor of the world, I am consequently the law of the sea.” Nor is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves among other titles “King of the

Former
Claims to
Control
over the
Sea.

¹ L. 13, pr. D. VIII. 4: mari quod natura omnibus patet.

² L. 3 D. XLIII. 8: Maris com-

munem usum omnibus hominibus ut aeris.

³ L. 9 D. XIV. 2: ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης.

Ocean." Real claims to sovereignty over parts of the Open Sea begin, however, to be made in the second half of the Middle Ages. And there is no doubt whatever that at the time when the modern Law of Nations gradually rose it was the conviction of the States that they could extend their sovereignty over certain parts of the Open Sea. Thus, the Republic of Venice was recognised as the Sovereign over the Adriatic Sea, and the Republic of Genoa as the Sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, Spain over the Pacific and the Gulf of Mexico, both Portugal and Spain basing their claims on two Papal Bulls promulgated by Alexander VI. in 1493, which divided the new world between these Powers. Sweden and Denmark claimed sovereignty over the Baltic, Great Britain over the Narrow Seas, the North Sea, and the Atlantic from the North Cape to Cape Finisterre.

These claims have been more or less successfully asserted for several hundreds of years. They were favoured by a number of different circumstances, such as the maintenance of an effective protection against piracy for instance. And numerous examples can be adduced which show that such claims have more or less been recognised. Thus, Frederick III., Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia through the Adriatic Sea.¹ Thus, Great Britain in the seventeenth century compelled foreigners to take out an English licence for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such licence, they were attacked and compelled to pay £30,000 as the price for the indulgence.² Again, when Philip II. of

¹ See Walker, "History," I. p. 163.

² This and the two following examples are quoted by Hall, § 40.

Spain was in 1554 on his way to England to marry Queen Mary, the British Admiral, who met him in the "British Seas," fired on his ship for flying the Spanish flag. And the King of Denmark, when returning from a visit to James I. in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag.

§ 249. Maritime sovereignty found expression in maritime ceremonials at least. Such State as claimed sovereignty over a part of the Open Sea required foreign vessels navigating on that part to honour its flag¹ as a symbol of recognition of its sovereignty. So late as 1805 the British Admiralty Regulations contained an order² to the effect that "when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's Seas (which extend to Cape Finisterre), it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty."

Practical
Expres-
sion of
claims to
Maritime
Sove-
reignty.

But apart from maritime ceremonials maritime sovereignty found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control or even the prohibition of foreign navigation. Thus, Portugal and Spain attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created an opposition to the very existence of such rights. English, French, and Dutch explorers and traders navigated on the Indian Ocean and the Pacific in spite of the Spanish

¹ See Fulton, "The Sovereignty of the Seas" (1911), pp. 38 and 204-208.

² Quoted by Hall, § 40.

and Portuguese interdictions. And when, in 1680, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean.¹

Grotius's
Attack on
Maritime
Sove-
reignty.

§ 250. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the Open Sea. Twenty-nine years after her answer to Mendoza, in 1609, appeared Grotius's short treatise² "*Mare liberum*." The intention of Grotius was to show that the Dutch had a right of navigation and commerce with the Indies in spite of the Portuguese interdictions. He contends that the sea cannot be State property, because (it cannot really be taken into possession through occupation,) and that consequently the sea is by nature free from the sovereignty of any State.⁴ The attack of Grotius was met by several authors of different nations. Gentilis defends Spanish and English claims in his "*Advocatio Hispanica*," which appeared in 1613. Likewise, in 1613 William Welwood defends the English claims in his book, "*De dominio maris*." John Selden wrote his "*Mare Clau-*

¹ See Walker, "History," I. p. 161. It is obvious that this attitude of Queen Elizabeth was in no way the outcome of the conviction that really no State could claim sovereignty over a part of the Open Sea. For she herself did not think of dropping the British claims to sovereignty over the "British Seas." Her arguments against the Spanish claims were made in the interest of the growing commerce and navigation of England, and any one daring to apply the same arguments against England's claims would have incurred her royal displeasure.

² Its full title is: "*Mare liberum, seu de jure quod Batavis competit ad Indicana commercia Dissertatio*," and it is now proved that this short treatise is only chapter 12 of another work of Grotius, "*De jure praedae*," which was found in manuscript in 1864 and published in 1868. See above, § 53.

³ See below, § 259.

⁴ Grotius was by no means the first author who defended the freedom of the sea. See Nys, "*Les origines du droit international*," pp. 381 and 382.

sum sive de dominio maris" in 1618, but it was not printed until 1635. Sir John Burroughs published in 1653 his book, "The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom." And in defence of the claims of the Republic of Venice Paolo Sarpi published in 1676 his book "Del dominio del mare Adriatico." The most important of these books defending maritime sovereignty is that of Selden. King Charles I., by whose command Selden's "Mare Clausum" was printed in 1635, was so much impressed by it that he instructed in 1619 his ambassador in the Netherlands to complain of the audacity of Grotius and to request that the author of the "Mare liberum" should be punished.¹

The general opposition to Grotius's bold attack on maritime sovereignty prevented his immediate victory. Too firmly established were the then recognised claims to sovereignty over certain parts of the Open Sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of navigation of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation on the so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the Open Sea was practically free for vessels of all nations. But with regard to other points, claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels had to salute the British flag within the "British Seas" as a recognition of British maritime sovereignty.²

§ 251. In spite of opposition, the work of Grotius

Gradual
Recogni-

¹ See Phillimore, I. § 182.

² See Hall, § 40, p. 152, note 1.

tion of the
Freedom
of the
Open Sea.

was not to be undone. All prominent writers of the eighteenth century take up again the case of the freedom of the Open Sea, making a distinction between the maritime belt which is to be considered under the sway of the littoral States, and, on the other hand, the High Seas, which are under no State's sovereignty. The leading author is Bynkershoek, whose standard work, "De dominio maris," appeared in 1702. Vattel, G. F. de Martens, Azuni, and others follow the lead. And although Great Britain upheld her claim to the salute due to her flag within the "British Seas" throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the Open Sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century this principle became universally recognised in theory and practice. Great Britain silently dropped her claim to the salute due to her flag, and with it her claim to maritime sovereignty, and became now a champion of the freedom of the Open Sea. When, in 1821, Russia, who was then still the owner of Alaska in North America, attempted to prohibit all foreign ships from approaching the shore of Alaska within one hundred Italian miles, Great Britain and the United States protested in the interest of the freedom of the Open Sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825. And when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within Behring Sea, claiming thereby jurisdiction and control over a part of the Open Sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration¹ in 1893 in favour of the freedom of the Open Sea.

¹ See below, § 284.

II

CONCEPTION OF THE OPEN SEA

Field, article 53—Westlake, I. p. 160—Moore, II. § 308—Rivier, I. pp. 234—235—Pradier-Fodéré, II. No. 868—Ullmann, § 101—Stoerk in Holtzendorff, II. p. 483.

§ 252. Open Sea or High Seas¹ is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are parts of the sea, but not parts of the Open Sea. Wherever there is a salt-water sea on the globe, it is part of the Open Sea, provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and (provided that the salt water approach to it is navigable and open to vessels of all nations.) The enclosure of a sea by the land of one and the same State does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more littoral States. Whereas, therefore, the Dead Sea is Turkish and the Aral Sea is Russian territory, the Sea of Marmora is part of the Open Sea, although it is surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are now open to merchantmen of all nations. For the same reason the Black Sea² is now part of the Open Sea. On the other hand, the Sea of Azoff is not part of the Open Sea, but Russian territory, although there exists a navigable connection between it and the Black Sea. The reason is that this connection, the Strait of Kertch,

Discrimination between Open Sea and Territorial Waters.

¹ Field defines in article 53: "The High Seas are the ocean, and all connecting arms and bays or other extensions thereof not within the

territorial limits of any nation whatever."

² See above, § 181.

is not according to the Law of Nations open to vessels of all nations, since the Sea of Azoff is less a sea than a mere gulf of the Black Sea.¹

Clear Instances of Parts of the Open Sea.

§ 253. It is not necessary and not possible to particularise every portion of the Open Sea. It is sufficient to state instances which clearly indicate the extent of the Open Sea. To the Open Sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and, further, the branches of these branches, which again go under special names, belong likewise to the Open Sea. Examples of these branches are: the North Sea, the English Channel, and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea,² and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, the Sea of Japan, and the Sea of Okhotsk; the Behring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay.

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the Open Sea or are territorial.³

¹ So say Rivier, I. p. 237, and Martens, I. § 97: but Stoerk in Holtzendorff, II. p. 513, declares that the Sea of Azoff is part of the Open Sea.

publicists that the Kara Sea is Russian territory is refuted by Martens, I. § 97. As regards the Kara Straits, see above, § 194.

² See above, § 191.

³ The assertion of some Russian

III

THE FREEDOM OF THE OPEN SEA

Hall, § 75—Westlake, I. pp. 160-166—Lawrence, § 100—Twiss, I. §§ 172-173—Moore, II. §§ 309-310—Taylor, § 242—Wheaton, § 187—Bluntschli, §§ 304-308—Heffter, § 94—Stoerk in Holtzendorff, II. pp. 483-498—Ullmann, § 101—Bonfils, Nos. 572-577—Pradier-Fodéré, II. Nos. 874-881—Rivier, I. § 17—Nys, II. pp. 140-166—Calvo, I. § 346—Fiore, II. Nos. 724, 727, and Code, Nos. 928-930—Martens, I. § 97—Perels, § 4—Testa, pp. 63-66—Ortolan, "Diplomatie de la mer" (1856), I. pp. 119-149—De Burgh, "Elements of Maritime International Law" (1868), pp. 1-24—Castel, "Du principe de la liberté des mers" (1900), pp. 37-80.

§ 254. The term "Freedom of the Open Sea" indicates the rule of the Law of Nations that the Open Sea is not and never can be under the sovereignty of any State whatever. Since, therefore, the Open Sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction,¹ or police² over parts of the Open Sea. Since, further, the Open Sea can never be under the sovereignty of any State, no State has a right to acquire parts of the Open Sea through occupation,³ for, as far as the acquisition of territory is concerned, the Open Sea is what Roman Law calls *res extra commercium*.⁴ But although the Open Sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The very fact alone of such a rule exempting the Open Sea from the sovereignty of any State whatever shows this. But there are other reasons. For if the Law of Nations

Meaning
of the
Term
"Freedom
of the
Open
Sea."

¹ As regards jurisdiction in cases of collision and salvage on the Open Sea, see below, §§ 265 and 271.

² See, however, above, § 190, concerning the zone for Revenue and Sanitary Laws.

³ Following Grotius (II. c. 3, § 13) and Bynkershoek ("De dominio maris," c. 3), some writers (for instance, Phillimore, I. § 203) maintain that any part of the Open Sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State.

And some French writers go even beyond that and claim a certain zone round the respective vessel as temporary territory of the flag State. But this is an absolutely superfluous fiction. (See Stoerk in Holtzendorff, II. p. 494; Rivier, I. p. 238; Perels, pp. 37-39.)

⁴ But the subsoil of the bed of the Open Sea can well, through driving mines and piercing tunnels from the coast, be acquired by a littoral State. See above, § 221, and below, §§ 287c and 287d.

were to content itself with the rule which excludes the Open Sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the Open Sea. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the Open Sea in spite of the fact that it is not the territory of any State.

Legal Provisions for the Open Sea.

§ 255. This legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely :—First, that every State which has a maritime flag must lay down rules according to which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag ; secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so ; thirdly, that all vessels with their persons and goods are, whilst on the Open Sea, considered under the sway of the flag State ; fourthly, that every State has a right to punish piracy on the Open Seas even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag.

These customary rules of International Law are, so to say, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags ; secondly, regarding the details of jurisdiction over persons and goods on board vessels sailing under their flags ; thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers ; fourthly, concerning punishment of ships sailing without authorisation under their flags.

The fact that each maritime State has a right to legislate for its own vessels gives it a share in keeping up a certain order on the Open Sea. And such order has been turned into a more or less general order since the large maritime States have concurrently made more or less concordant laws for the conduct of their vessels on the Open Sea.

§ 256. Although the Open Sea is free and not the territory of any State, it may nevertheless in its whole extent become the theatre of war, since the region of war is not only the territories of the belligerents, but likewise the Open Sea, provided that one of the belligerents at least is a Power with a maritime flag.¹ Men-of-war of the belligerents may fight a battle in any part of the Open Sea where they meet, and they may capture all enemy merchantmen they meet on the Open Sea. And, further, the jurisdiction and police of the belligerents become through the outbreak of war in so far extended over vessels of other States, that belligerent men-of-war may now visit, search, and capture neutral merchantmen for breach of blockade, contraband, and the like.

Freedom
of the
Open Sea
and war.

However, certain parts of the Open Sea can become neutralised and thereby be excluded from the region of war. Thus, the Black Sea became neutralised in 1856 through article 11 of the Peace Treaty of Paris stipulating:—"La Mer Noire est neutralisée: ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdites au pavillon de guerre, soit des puissances riveraines, soit de tout autre puissance." Yet this neutralisation of the Black Sea was abolished² in 1871 by article 1 of the Treaty of London, and no other part of the Open Sea is at present neutralised.

¹ Concerning the distinction between theatre and region of war, see below, vol. II. § 70.

² See above, § 181.

Navigation and
ceremonials
on the
Open Sea.

§ 257. The freedom of the Open Sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels, or merchantmen. It involves, further, absence of compulsory maritime ceremonials on the Open Sea. According to the Law of Nations, no rights whatever of salute exist between vessels meeting on the Open Sea. All so-called maritime ceremonials on the Open Sea¹ are a matter either of courtesy and usage or of special conventions and Municipal Laws of those States under whose flags vessels sail. There is in especial no right of any State to require a salute from foreign merchantmen for its men-of-war.²

The freedom of the Open Sea involves likewise freedom of inoffensive passage³ through the maritime belt for merchantmen of all nations, and also for men-of-war of all nations in so far as the part concerned of the maritime belt forms a part of the highways for international traffic. Without such freedom of passage, navigation on the Open Sea by vessels of all nations would be a physical impossibility.

Claim of
States to
Maritime
Flag.

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the Open Sea, sail under the flag of a State, the question has been raised whether not only maritime States but also such States as are not littoral States of the Sea have a claim to a maritime flag. There ought to be no doubt⁴ that the freedom of the Open Sea involves a claim of any State to a maritime flag. At present no non-littoral State actually has a maritime flag, and

¹ But not within the maritime belt or other territorial waters. See above, §§ 122 and 187.

² That men-of-war can on the Open Sea ask suspicious foreign merchantmen to show their flags has nothing to do with ceremonials, but

with the supervision of the Open Sea in the interest of its safety. See below, § 266.

³ See above, § 188.

⁴ See, however, Westlake, I. p. 165.

all vessels belonging to subjects of such non-littoral States sail under the flag of a maritime State. But any day might bring a change. The question as to the claim to a maritime flag on the part of a non-littoral State was discussed in Switzerland. When, in 1864, Swiss merchants in Trieste, Smyrna, Hamburg, and St. Petersburg applied to the Swiss Bundesrath for permission to have their vessels sailing under the Swiss flag, the Bundesrath was ready to comply with the request, but the Swiss Parliament, the Bundesversammlung, refused the necessary consent. In 1889 and 1891 new applications of the same kind were made, but Switzerland again refused to have a maritime flag.¹ She had no doubt that she had a claim to such flag, but was aware of the difficulties arising from the fact that, having no seaports of her own, vessels sailing under her flag would in many points have to depend upon the goodwill of the maritime Powers.²

Such States as have a maritime flag as a rule have a war flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine. But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy. This is the position of Montenegro³ according to article 29 of the Treaty of Berlin of 1878.

§ 259. Grotius and many writers who follow⁴ him establish two facts as the reason for the freedom of the Open Sea. They maintain, first, that a part of

Rationale
for the
Freedom
of the
Open Sea.

¹ See Salis, "Schweizerisches Bundesrecht" (1891), vol. I. p. 234.

² The question is discussed by Calvo, I. § 427; Twiss, I. §§ 197 and 198; and Westlake, I. p. 165.

³ See above, § 127, but it is doubtful whether this restriction is still in existence, since article 29 has, after the annexation of Bosnia and

Herzegovina by Austria in 1908, been modified by the Powers, so that the port of Antivari and the other Montenegrin waters are now no longer closed to men-of-war of all nations. See R.G. XVII. (1910), pp. 173-176.

⁴ See, for instance, Twiss, I. § 172, and Westlake, I. p. 160.

the Open Sea could not effectively be occupied by a Navy and could therefore not be brought under the actual sway of any State. And they assert, secondly, that Nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and, therefore, sufficient for all.¹ The last argument has nowadays hardly any value, especially for those who have freed themselves from the fanciful rules of the so-called Law of Nature. And the first argument is now without basis in face of the development of the modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the Open Sea. The real reason for the freedom of the Open Sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of communication, and especially commerce, between the States which are severed by the Sea. The Sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is in the interest of free intercourse² between the States that the principle of the freedom of the Open Sea has become universally recognised and will always be upheld.³

¹ See Grotius, II. c. 2, § 3.

² See above, § 142.

³ Connected with the reason for the freedom of the Open Sea is the merely theoretical question whether the vessels of a State could through

an international treaty be prevented from navigating on the whole or on certain parts of the Open Sea. See Pradier-Fodéré, II. Nos. 881–885, where this point is exhaustively discussed.

IV

JURISDICTION ON THE OPEN SEA

Vattel, II. § 80—Hall, § 45—Westlake, I. pp. 166–176—Lawrence, § 100—Halleck, p. 438—Taylor, §§ 262–267—Walker, § 20—Wheaton, § 106—Moore, II. §§ 309–310—Bluntschli, §§ 317–352—Heffter, §§ 78–80—Stoerk in Holtzendorff, II. pp. 518–550—Liszt, § 26—Bonfils, Nos. 578–580, 597–613—Despagnet, Nos. 422–430—Mérignhac, II. pp. 505–511—Pradier-Fodéré, V. Nos. 2376–2470—Rivier, I. § 18—Nys, II. pp. 139–165—Calvo, I. §§ 385–473—Fiore, II. Nos. 730–742, and Code, Nos. 1001–1027—Martens, II. §§ 55–56—Perels, § 12—Testa, pp. 98–112—Ortolan, “Diplomatie de la mer” (1856), II. 254–326—Hall, “Foreign Powers and Jurisdiction of the British Crown” (1894), §§ 106–109.

§ 260. Jurisdiction on the Open Sea is in the main connected with the maritime flag under which vessels sail. This is the consequence of the fact stated above¹ that a certain legal order is created on the Open Sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag. But two points must be emphasised. The one is that this jurisdiction is not jurisdiction over the Open Sea as such, but only over vessels, persons, and goods on the Open Sea. And the other is that jurisdiction on the Open Sea is, although mainly, not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,² certain powers over merchantmen of all nations. The points which must therefore be here discussed singly are—the claim of vessels to sail under a certain flag, ship-papers, the names of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the Open Sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck.

Jurisdiction on the Open Sea mainly connected with Flag.

§ 261. The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every

Claim of Vessels to sail under a certain Flag.

¹ See above, § 255.

² See below, § 266.

State having a maritime flag to stipulate by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the Open Sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the Open Sea is freedom for such vessels only as sail under the flag of a State. But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag. It can in especial authorise such vessels to sail under its flag as are the property of foreign subjects; but such foreign vessels sailing under its flag fall thereby under its jurisdiction. The different States have made different rules concerning the sailing of vessels under their flags.¹ Some, as Great Britain² and Germany, allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory. Others, as Argentina, admit vessels which are the property of foreigners. Others again, as France, admit vessels which are in part the property of French citizens.³

But no State can allow such vessel to sail under its flag as already sails under the flag of another State. Just as a vessel not sailing under the flag of a State, so a vessel sailing under the flags of two different States does not enjoy any protection whatever. Nor is protection enjoyed by such vessel as sails under the flag of a State which, like Switzerland, has no maritime flag. Vessels belonging to persons who are subjects of States without a maritime flag must obtain authority to sail

¹ See Calvo, I. §§ 393–423, where the respective Municipal Laws of most countries are quoted.

² See section 1 of the Merchant Shipping Act, 1894 (27 and 28 Vict. c. 60), and sections 51 and 80 of the Merchant Shipping Act, 1906 (6 Ed. VII. c. 7).

³ The Institute of International

Law adopted, at its meeting at Venice—see *Annuaire*, XV. (1896), p. 201—in 1896, a body of ten rules concerning the sailing of merchantmen under the maritime flag of a State under the heading:—“*Règles relatives à l’usage du pavillon national pour les navires de commerce.*”

under some other State's flag, if they wish to enjoy protection on the Open Sea. And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.¹

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship papers, which serve the purpose of identification on the Open Sea. But neither the number nor the kind of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.² But, on the other hand, they agree as to the following papers :—

Ship
Papers.

(1) An official voucher authorising the vessel to sail under its flag. This voucher consists of a Certificate of Registry, in case the flag State possesses, like Great Britain and Germany for instance, a register of its mercantile marine ; in other cases the voucher consists of a "Passport," "Sea-letter," "Sea-brief," or of some other document serving the purpose of showing the vessel's nationality.

(2) The Muster Roll. This is a list of all the members of the crew, their nationality, and the like.

(3) The Log Book. This is a full record of the voyage, with all nautical details.

(4) The Manifest of Cargo. This is a list of the cargo of a vessel, with details concerning the number and the mark of each package, the names of the shippers and the consignees, and the like.

(5) The Bills of Lading. These are duplicates of

¹ See the case of the steamship *Maori King v. His Britannic Majesty's Consul-General at Shanghai*, L.R., App. c. 1909, p. 562, and sections 69 and 76 of the Merchant Shipping Act, 1894 (27 and 28 Vict. c. 60).

² See Holland, "Manual of Naval Prize Law," §§ 178-194, where the papers required by the different maritime States are enumerated.

the documents which the master of the vessel hands over to the shipper of the goods at shipment.

(6) The Charter Party, if the vessel is chartered. This is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, the person who hires it. /

Names of
Vessels.

§ 263. Every State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly, so that every vessel may be identified from a distance. No vessel must be allowed to change her name without permission and fresh registration.¹

Terri-
torial
Quality of
Vessels on
the Open
Sea.

§ 264. It is a customary rule of the Law of Nations that men-of-war and other public vessels of any State are, whilst on the Open Sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States.² Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the Open Sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made, a crime³ committed on board ship, and the like, are considered as happening on the territory and therefore under the territorial supremacy of the flag⁴ State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State. For in time of war belligerent men-of-war can visit, search, and capture neutral private vessels on the Open Sea for breach of blockade, contraband, and the like,

¹ As regards Great Britain, see sections 47 and 48 of the Merchant Shipping Act, 1894, and sections 50 and 53 of the Merchant Shipping Act, 1906.

² See above, § 172, and below, §§ 447-451.

³ See Jordan in R.I. 2nd Ser. X. (1908), pp. 340-362 and 481-500.

⁴ Since, however, individuals abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the Open Sea on board a foreign vessel.

and in time of peace men-of-war of all nations have certain powers¹ over merchantmen of all nations.

§ 265. No rules of the Law of Nations exist as yet² for the purpose of preventing collisions, saving lives after collisions, and the like, but every State possessing a maritime flag has legislated for the conduct on the Open Sea of vessels sailing under its flag concerning signalling, piloting, courses, collisions, and the like. Although every State can legislate on these matters independently of other States, more and more corresponding rules have been put into force by all the States during the second half of the nineteenth century, following the lead given by Great Britain through section 25 of the Merchant Shipping Act Amendment Act of 1862, the "Regulations for preventing Collisions at Sea" which accompany this Act, and, further, Sections 16 to 20 of the Merchant Shipping Act, 1873.³ And the "Commercial Code of Signals for the Use of all Nations," published by Great Britain in 1857, has been adopted by all maritime States. In 1889 a maritime Conference took place at Washington, at which eighteen maritime States were represented and which recommended a body of rules for preventing collisions at sea to be adopted by the single States,⁴ and a revision of the Code of Signals. These regulations were revised in 1890 by a British Committee appointed by the Board

Safety of
Traffic on
the Open
Sea.

¹ See below, § 266. The question of the territoriality of vessels is ably discussed by Hall, §§ 76-79.

² It is to be expected that matters will soon undergo a change, for the Conference of the International Maritime Committee, which met at Brussels in September 1910 and where all the maritime States of Europe, the United States of America, most of the South American States, and Japan were represented, produced a draft convention concerning collisions (see Supplement to the *American Journal of International Law*, IV. (1910), p. 121). The "Maritime Conventions Bill,"

which is now before Parliament, proposes such alterations of British Municipal Law as would enable the British Government to ratify this Convention. The Institute of International Law already in 1888, at its meeting at Lausanne—see *Annuaire*, X. (1889), p. 150—adopted a body of eight rules concerning the subject.

³ See 25 and 26 Vict. c. 63; 36 and 37 Vict. c. 83. The matter is now dealt with by sections 418-421 of the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60).

⁴ See Martens, N.R.G. 2nd Ser. XII. p. 416.

of Trade,¹ and, after some direct negotiations between the Governments, most maritime States have made corresponding regulations by their Municipal Laws.² And a new and revised edition of "The International Code of Signals" was published by the British Board of Trade, in conformity with arrangements with other maritime Powers, in 1900, and is now in general use.³

The question of jurisdiction in actions for damages for collision at sea is not at all settled.⁴ That the damaged innocent vessel can bring an action against the guilty ship in the Courts of the latter's flag State is beyond doubt since jurisdiction on the Open Sea follows the flag. If the rule that all vessels while on the Open Sea are considered under the sway of their flag State were one without exception, no other State would claim jurisdiction in cases of collision but the flag State of the guilty ship. Yet the practice of the maritime States⁵ goes far beyond this, without, however, being uniform. Thus, for instance, France⁶ claims jurisdiction if the damaged ship is French, although the guilty ship may be foreign, and also in the event of both ships being foreign in case both consent, or for urgent measures having a provisional character, or in case France is a place of payment. Thus, further, Italy⁷ claims jurisdiction even if both ships are foreign in case an Italian port is the port nearest to the collision, or in case the damaged ship was forced by the collision to remain in

¹ See Martens, N.R.G. 2nd Ser. XXII. p. 113.

² Latest British Regulations, 1896.

³ The matter of collision at sea is exhaustively treated by Prien, "*Der Zusammenstoss von Schiffen nach dem Gesetzen des Erdballs*" (2nd ed. 1899).

⁴ See Phillimore, IV. § 815; Calvo, I. § 444; Pradier-Fodéré, V. Nos. 2362-2374; Bar, "*Private International Law*" (2nd ed. translated by Gillespie), pp. 720 and 928; Dicey,

"*Conflict of Laws*" (2nd ed.), pp. 650-652 and 790; Foote, "*Private International Law*" (3rd ed.), pp. 486 and 495; Westlake, "*Private International Law*" (3rd ed.), pp. 266-269; Marsden, "*The Law of Collisions at Sea*" (6th ed. 1910); Williams and Bruce, "*Treatise on the Jurisdiction of English Courts in Admiralty Actions*" (3rd ed. 1902).

⁵ See above, § 146.

⁶ See Pradier-Fodéré, No. 2363.

⁷ See Pradier-Fodéré, No. 2364.

an Italian port. Great Britain goes farthest, for the Admiralty Court claims jurisdiction provided the guilty ship is in a British port at the time the action for damages is brought, even if the collision took place between two foreign ships anywhere on the High Seas.¹ And the Admiralty Court justifies this extended claim of jurisdiction² by maintaining that collision is a matter of *communis juris*, and can therefore be adjudicated upon by the Courts³ of all maritime States.⁴

§ 266. Although the freedom of the Open Sea and the fact that vessels on the Open Sea remain under the jurisdiction of the flag State exclude as a rule the exercise of any State's authority over foreign vessels, there are certain exceptions in the interest of all maritime nations. These exceptions are the following:—

Powers of
Men-of
war over
Merchant-
men of all
Nations.

(1) Blockade and Contraband. In time of war belligerents can blockade not only enemy ports and territorial coast waters, but also parts of the Open Sea adjoining those ports and waters, and neutral merchantmen attempting to break such a blockade can be confiscated. And, further, in time of war belligerent men-of-war can visit, search, and eventually seize neutral merchantmen for contraband, and the like.

(2) Verification of Flag. It is a universally recognised customary rule of International Law that men-of-war of all nations have, to maintain the safety of the Open Sea against piracy, the power to require suspicious private vessels on the Open Sea to show their

¹ Or even in foreign territorial waters. See Williams and Bruce, *op. cit.*, p. 78:—"The Admiralty Court from ancient times exercised jurisdiction in cases of collision between foreign vessels on the High Seas; and since the Admiralty Court Act, 1861, it has entertained suits for collision between ships in foreign waters, and between an English and a foreign ship in foreign waters."

² The *Johann Friederich* (1838), 1 W. Robinson, 35; the *Chartered*

Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co., 10 Q.B.D. 537.

³ The practice of the United States of America coincides with that of Great Britain; see the case of the *Belgenland*, 114, United States, 355, and Wharton, I. § 27.

⁴ The Institute of International Law, at its meeting at Lausanne in 1888, adopted two rules concerning the jurisdiction in cases of collision; see *Annuaire*, X. (1889), p. 152.

flag.¹ But such vessels must be suspicious, and, since a vessel may be a pirate although she shows a flag, she may eventually be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power of men-of-war must not be abused, and that the home State is responsible for damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground of suspicion. The right of every State to punish piracy on the Open Sea will be treated below, §§ 272–280.

(3) So-called Right of Pursuit. It is a universally recognised customary rule that men-of-war of a littoral State can pursue into the Open Sea, seize, and bring back into a port for trial any foreign merchantman that has violated the law whilst in the territorial waters of the State in question. But such pursuit into the Open Sea is permissible only if commenced while the merchantman is still in the said territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of a foreign State.²

(4) Abuse of Flag. It is another universally recognised rule that men-of-war of every State may seize and bring to a port of their own for punishment any foreign vessel sailing under the flag of such State without authority.³ Accordingly, Great Britain has, by

¹ So-called “Droit d'enquête” or “Vérification du pavillon.” This power of men-of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion this power does exist. See Twiss, I. § 193; Hall, § 81, p. 276; Fiore, II. Nos. 732–736; Perels, § 17; Taylor, § 266; Bonfil, No. 519.

² See Hall, § 80.

³ The four exceptions mentioned in the text above are based on universally recognised customary rules of the Law of Nations. It is, of course, possible for several States

to enter into treaty agreements according to which their men-of-war acquire certain powers over each other's merchantmen on the Open Sea. According to such agreements, which are, however, not universal, the following additional exceptions may be enumerated:—

(1) In the interest of the suppression of the slave trade, the signatory Powers of the General Act of the Brussels Conference of 1890 to which all the larger maritime Powers belong, have, by articles 20–65, stipulated that their men-of-war shall have the power, in certain parts

section 69 of the Merchant Shipping Act, 1894, enacted : —“ If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.”

§ 267. A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify the same, hoists her own flag and fires a blank cartridge. This is a signal for the other vessel to hoist her flag in reply. If she takes no notice of the signal, the man-of-war fires a shot across her bows. If the suspicious vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

How Verification of Flag is effected.

§ 268. The intention to visit may be communicated to a merchantman either by hailing or by the “informing gun”—that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to. After the vessel has been brought to, either an officer is sent on board for the purpose of inspecting her papers, or her master is ordered to bring his ship papers for inspection on board the man-of-war. If the inspection proves the papers to be

How Visit is effected.

of the Open Sea where slave traffic still continues, to stop every suspect vessel under 500 tons.

(2) In the interest of the Fisheries in the North Sea, special cruisers of the littoral Powers control all fishing vessels and bumboats. See below, §§ 282 and 283.

(3) In the interest of Transatlantic telegraph cables, men-of-war of the signatory Powers of the treaty for the protection of such cables have certain powers over merchantmen. (See below, § 287.)

in order, a memorandum of the visit is made in the log-book, and the vessel is allowed to proceed on her course.

How
Search is
effected.

§ 269. Search is naturally a measure which visit must always precede. It is because the visit has given no satisfaction that search is instituted. Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being compelled to render any assistance whatever except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searchers have carefully to replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course.

How
Arrest is
effected.

§ 270. Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which alone already justifies her seizure. Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. Such officer is responsible for the vessel and her cargo, which latter must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest. Thus, neutral or enemy ships seized in time of war are always¹ to be brought into a harbour of the flag State of the captor. And the same is the case in time of peace, when a vessel is seized because her flag cannot be verified, or because she was sailing under no flag at all. On the other hand, when a fishing vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour of her flag State and handed over to the authorities there.²

¹ Except in the case of distress or unseaworthiness; see below, vol. II. § 193.

² See below, §§ 282 and 283.

§ 271. It is at present the universal conviction on the part of the States that goods and persons shipwrecked on the Open Sea do not thereby lose the protection of the flag State of the shipwrecked vessel. No State is allowed to recognise appropriation of abandoned vessels and other derelicts on the Open Sea by those of its subjects who take possession thereof. But every State can by its Municipal Laws enact that those of its subjects who take possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage,¹ whether the act of taking possession occurred on the actual Open Sea or within territorial waters and on shore of the respective State.

Shipwreck
and Dis-
tress on
the Open
Sea.

As regards vessels in distress on the Open Sea, some writers² maintain that men-of-war must render assistance even to foreign vessels in distress. But it is impossible to say that there is a customary or conventional rule of the Law of Nations in existence which imposes upon all States the duty of instructing their men-of-war to render assistance to foreign vessels in distress, although many States order by Municipal Regulations their men-of-war to render such assistance, and although morally every vessel is bound to render assistance to another vessel in distress.³

¹ The Conference of the Maritime Committee held at Brussels in September 1910 also produced a draft convention concerning salvage, which the British Government likewise intends to ratify provided Parliament passes the "Maritime Conventions Bill," see above, § 265, p. 333, note 2, and Supplement to the *American Journal of International Law*, IV. (1910), p. 126. According to the practice of the Admiralty Court—see the case of the *Johann Friederich*, 1 W. Robinson, 35—salvage on the Open Sea is, just like collisions, a matter of *communis juris* upon which the Courts of all maritime States are competent to adjudicate. See Phillimore, IV. § 815;

and Dicey, "Conflict of Laws" (2nd ed. 1908), p. 791. See also sect. 545 and 565 of the Merchant Shipping Act, 1894.

² See, for instance, Perels, § 25, and Fiore, II. No. 732.

³ According to article 11 of the draft convention concerning salvage produced by the Conference of the Maritime Committee at Brussels in September 1910—see above, note 1—"every master shall be obliged, as far as he can do so without serious danger to his vessel, his crew, or his passengers, to lend assistance to any person, even an enemy, found at sea in danger of perishing. The owner of the vessel shall not be liable for violations of the foregoing provision."

V

PIRACY

Hall, §§ 81-82—Westlake, I. pp. 177-182—Lawrence, § 102—Phillimore, I. §§ 356-361—Twiss, I. §§ 177 and 193—Halleck, I. pp. 444-450—Taylor, §§ 188-189—Walker, § 21—Westlake, I. pp. 177-182—Wheaton, §§ 122-124—Moore, II. §§ 311-315—Bluntschli, §§ 343-350—Heffter, § 104—Gareis in Holtzendorff, II. pp. 571-581—Gareis, § 58—Liszt, § 26—Ullmann, § 104—Bonfils, Nos. 592-594—Despagnet, Nos. 431-433—Mérignhac, II. pp. 506-511—Pradier-Fodéré, V. Nos. 2491-2515—Rivier, I. pp. 248-251—Calvo, I. §§ 485-512—Fiore, I. Nos. 494-495, and Code, Nos. 295-300—Perels, §§ 16-17—Testa, pp. 90-97—Ortolan, "Diplomatie de la mer" (1856), I. pp. 231-253—Stiel, "Der Thatbestand der Piraterie" (1905).

Concep-
tion of
Piracy.

§ 272. Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are practically treated as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship and the goods thereon to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Thus, secondly, if unauthorised acts of violence, such as murder of persons on board the attacked vessel or destruction of goods thereon, are committed on the Open Sea without intent to plunder, such acts are practically considered to be piratical. Under these circumstances several writers,¹ correctly, I think, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. But no unanimity exists among these very writers concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such

¹ Hall, § 81; Lawrence, § 102; Bluntschli, § 343; Liszt, § 26; Calvo, § 485.

acts as are practically treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*¹

Already, before a Law of Nations in the modern sense of the term was in existence, a pirate was considered an outlaw, a "hostis humani generis." According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called "international crime";² the pirate is considered the enemy of every State, and can be brought to justice anywhere.

§ 273. Private vessels only³ can commit piracy. A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander and to pay damages where required. But if a man-of-war or other public ship of a State revolts and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence now committed by her are indeed piratical acts. A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose services she is acting. And it matters not that the privateer is originally a neutral vessel.⁴ But if a neutral vessel were to take Letters of Marque from both belligerents, she would be considered a pirate.

Private
Ships as
Subjects
of Piracy.

¹ The conception of Piracy is discussed in the case of the Republic of Bolivia v. The Indemnity Mutual Marine Assurance Co., L.R. (1909), 1 K.B., 785.

² See above, § 151.

³ Piracy committed by the mutinous crew will be treated below, § 274.

⁴ See details regarding this controversial point in Hall, § 81. See also below, vol. II. §§ 83 and 330.

Doubtful is the case where a privateer in a civil war has received her Letters of Marque from the insurgents, and, further, the case where during a civil war men-of-war join the insurgents before the latter have been recognised as a belligerent Power. It is evident that the legitimate Government will treat such ships as pirates; but third Powers ought not to do so, as long as these vessels do not commit any act of violence against ships of these third Powers. Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents, and the Spanish Government proclaimed these vessels pirates, England, France, and Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels¹ abstained from acts of violence against the lives and property of their subjects.² On the other hand, when in 1877 a revolutionary outbreak occurred at Callao in Peru and the ironclad Huascar, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal without payment from one of these, and forcibly took two Peruvian officials from on board another where they were passengers, she was justly considered a pirate and attacked by the British Admiral de Horsey, who

¹ See Calvo, I. §§ 497-501; Hall, § 82; Westlake, I. pp. 179-182.

² But in the American case of the *Ambrose Light* (25 Federal 408; see also Moore, II. § 332, p. 1098) the Court did not agree with this. The *Ambrose Light* was a brigantine which, when on April 24, 1885, she was sighted by Commander Clark of the U.S.S. *Alliance* in the Caribbean Sea, was flying a strange flag showing a red cross on a white ground, but she afterwards hoisted the Columbian flag; when seized she was found to carry sixty armed soldiers, one cannon, and a considerable quantity of ammunition. She

bore a commission from Columbian insurgents, and was designed to assist in the blockade of the port of Carthagen

a by the rebels. Commander Clark considered the vessel to be a pirate and sent her in for condemnation. The Court held that in absence of any recognition of the Columbian insurgents as a belligerent Power the *Ambrose Light* had been lawfully seized as a pirate. The vessel was, however, nevertheless released because the American Secretary of State had recognised by implication a state of war between the insurgents and the legitimate Columbian Government.

was in command of the British squadron in the Pacific.¹

The case must also be mentioned of a privateer or man-of-war which after the conclusion of peace or the termination of war by subjugation and the like continues to commit hostile acts. If such vessel is not cognisant of the fact that the war has come to an end she cannot be considered as a pirate. Thus the Confederate cruiser *Shenandoah*, which in 1865, for some months after the end of the American Civil War, attacked American vessels, was not considered a pirate² by the British Government when her commander gave her up to the port authorities at Liverpool in November 1865, because he asserted that he had not known till August of the termination of the war, and that he had abstained from hostilities as soon as he had obtained this information.

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel without Letters of Marque during war out of hatred of one of the belligerents were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered as a pirate.³

§ 274. The crew or the whole or a part of the passengers who revolt on the Open Sea and convert the vessel and her goods to their own use, commit thereby piracy, whether the vessel is private or public. But a simple act of violence alone on the part of crew or passengers does not constitute in itself the crime of

Mutinous
Crew and
Passen-
gers as
Subjects
of Piracy.

¹ As regards the case of the Argentinian vessel *Porteña* and the Spanish vessel *Monteruma*, afterwards called *Cespedes*, see Calvo, I. §§ 502 and 503.

² See Lawrence, § 102.

³ This statement is correct in spite of art. 46, No. 1, of the Declaration of London; see below, vol. II. § 410, No. 1.

piracy, at least not as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty and afterwards carry on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

Object of
Piracy.

§ 275. The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the Open Sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate whether he does so or kills the crew and appropriates the ship, or sinks her. On the other hand, it does not matter if the cargo is not the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention to keep him for the purpose of a high ransom, his act is piracy. It is likewise piracy if he stops a vessel for the purpose of killing a certain person only on board, although he may afterwards free vessel, crew, and cargo.

That a possible object of piracy is not only another vessel, but also the very ship on which the crew and passenger navigate, is an inference from the statements above in § 274.

Piracy,
how
effected.

§ 276. Piracy is effected by any unauthorised act of violence, be it direct application of force or intimidation through menace. The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves. And a ship which, through the threat to sink her if she should refuse, forces another ship to deliver up

her cargo or a person on board, commits piracy as well as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board.

The act of violence need not be consummated to constitute the crime of piracy. The mere attempt, such as attacking or even chasing only for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence.¹

§ 277. Piracy as an "international crime" can be committed on the Open Sea only. Piracy in territorial coast waters has quite as little to do with International Law as other robberies on the territory of a State. Some writers² maintain that piracy need not necessarily be committed on the Open Sea, but that it suffices that the respective acts of violence are committed by descent from the Open Sea. They maintain, therefore, that if "a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy." With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the Open Sea, and therefore it cannot be committed anywhere else than on the Open Sea.

Where Piracy can be committed.

§ 278. A pirate and his vessel lose *ipso facto* by an act of piracy the protection of their flag State and their national character. Every maritime State has by a customary rule of the Law of Nations the right to

Jurisdiction over Pirates, and their Punishment.

¹ See Stephen, "Digest of the Criminal Law," article 104. In the case of the *Ambrose Light*—see above, § 273—the Court considered the vessel to be a pirate, although

no attempt to commit a piratical act had been made by her.

² Hall, § 81; Lawrence, § 102; Westlake, I. p. 177.

punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,¹ can on the Open Sea² chase, attack, seize, and bring the pirate home for trial and punishment by the Courts of their own country. In former times it was said to be a customary rule of International Law that pirates could at once after seizure be hanged or drowned by the captor. But this cannot now be upheld, although some writers assert that it is still the law. It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, interdict such execution. Concerning the punishment for piracy, the Law of Nations lays down the rule that it may be capital. But it need not be, the Municipal Law of the different States being competent to order any less severe punishment. Nor does the Law of Nations make it a duty for every maritime State to punish all pirates.³

That men-of-war of all nations have, with a view to insuring the safety of traffic, the power of verifying the flags of suspicious merchantmen of all nations, has already been stated above (§ 266, No. 2).

*Pirata
non mutat
domi-
nium.*

§ 279. The question as to the property in the seized piratical vessels and the goods thereon has been the subject of much controversy. During the seventeenth century the practice of several States conceded such vessel and goods to the captor as a premium. But during the eighteenth century the rule *pirata non mutat*

¹ A few writers (Gareis in Holtzendorff, II. p. 575; Liszt, § 26; Ullmann, § 104; Stiel, *op. cit.*, p. 51) maintain, however, that men-of-war only have the power to seize the pirate.

² If a pirate is chased on the Open Sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the littoral State.

³ Thus, according to the German

Criminal Code, piracy committed by foreigners against foreign vessels cannot be punished by German Courts (see Perels, § 17). From article 104 of Stephen's "Digest of the Criminal Law," there seems to be no doubt that, according to English Law, all pirates are liable to be punished. See Stiel, *op. cit.*, p. 15, note 4, where a survey is given of the Municipal Law of many States concerning this point.

dominium became more and more recognised. Nowadays the conviction would seem to be general that ship and goods have to be restored to their proprietors, and may be conceded to the captor only when the real ownership cannot be ascertained. In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so-called *droit de recousse*¹). Thus, according to British Law,² a salvage of 12½ per cent. is to be paid to the captor of the pirate.

§ 280. Piracy, according to the Law of Nations, which has been defined above (§ 272) as every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel, must not be confounded with the conception of piracy according to the different Municipal Laws.³ The several States may confine themselves to punishing as piracy a narrower circle of acts of violence than that which the Law of Nations defines as piracy. On the other hand, they may punish their subjects as pirates for a much wider circle of acts. Thus, for instance, according to the Criminal Law of England,⁴ every English subject is *inter alia* deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who transports slaves on the High Seas.

Piracy
according
to Muni-
cipal Law.

However, since a State cannot on the Open Sea enforce its Municipal Laws against others than its own subjects, no State can treat such foreign subjects on the Open Sea as pirates as are not pirates according

¹ See details regarding the question as to the piratical vessels and goods in Pradier-Fodéré, V. Nos. 2496-2499.

² See section 5 of the "Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction

of Piratical Ships, &c." (13 & 14 Vict. ch. 26).

³ See Calvo, §§ 488-492; Lawrence, § 103; Pradier-Fodéré, V. Nos. 2501 and 2502.

⁴ See Stephen, "Digest of the Criminal Law," articles 104-117.

to the Law of Nations. Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States objected and rightly complained.¹

VI

FISHERIES IN THE OPEN SEA

Grotius, II. c. 3, § 4—Vattel, I. § 287—Hall, § 27—Lawrence, §§ 86 and 91—Phillimore, I. §§ 181–195—Twiss, I. § 185—Taylor, §§ 249–250—Wharton, II. §§ 300–308—Wheaton, §§ 167–171—Moore, I. §§ 169–173—Bluntschli, § 307—Stoerk in Holtzendorff, II. pp. 504–507—Gareis, § 62—Liszt, § 35—Ullmann, § 103—Bonfils, Nos. 581–582, 595—Despagnet, Nos. 411–413—Mérignhac, II. p. 531—Pradier-Fodéré, V. Nos. 2446–2458—Rivier, I. pp. 243–245—Nys, II. pp. 165–169—Calvo, I. §§ 357–364—Fiore, II. Nos. 728–729, and Code, Nos. 995–999—Martens, I. § 98—Perels, § 20—Hall, “Foreign Powers and Jurisdiction” (1894), § 107—David, “La pêche maritime au point de vue international” (1897)—Fulton, “The Sovereignty of the Seas” (1911), pp. 57–534.

Fisheries
in the
Open Sea
free to all
Nations.

§ 281. Whereas the fisheries in the territorial maritime belt can be reserved by the littoral State for its own subjects, it is an inference of the freedom of the Open Sea that the fisheries thereon are open² to vessels

¹ See Wharton, III. § 327, pp. 142 and 143; Taylor, § 190; Moore, II. § 310, pp. 941–946.

² Denmark silently, by fishing regulations of 1872, dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland; see Hall, § 40, p. 153, note 2. Russia promulgated, in 1911, a statute forbidding the fisheries to foreign vessels within twelve miles of the shore of the White Sea, but the Powers protested against this encroachment upon the freedom of the Open Sea; the matter is still unsettled.

A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore and for which regulations exist which are enforced against foreign as well as British subjects. The claim on which these regulations are based is one “to the products

of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction.” See Hall, “Foreign Powers and Jurisdiction” (1894), p. 243, note 1. See also Westlake, I. p. 186, who says: “The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water

of all nations. Since, however, vessels remain whilst on the Open Sea under the jurisdiction of their flag State, every State possessing a maritime flag can legislate concerning the exercise of fisheries on the Open Sea on the part of vessels sailing under its flag. And for the same reason a State can by an international agreement renounce its fisheries on certain parts of the Open Sea, and accordingly interdict its vessels from exercising fisheries there. If certain circumstances and conditions make it advisable to restrict and regulate the fisheries on some parts of the Open Sea, the Powers are therefore able to create restrictions and regulations for that purpose through international treaties. Such treaties have been concluded—first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing vessels in that Sea; secondly, with regard to the seal fisheries in the Behring Sea; thirdly, with regard to the fisheries around the Farøe Islands and Iceland.

§ 282. For the purpose of regulating the fisheries in the North Sea, an International Conference took place at the Hague in 1881 and again in 1882, at which Great Britain, Belgium, Denmark, France, Germany, Holland, and Sweden-Norway were represented, and on May 6, 1882, the International Convention for the Regulation

Fisheries
in the
North Sea.

may allow it to be practised beyond the limit which the State in question generally fixes for the littoral seas, as in the case of Ceylon it is practised beyond the three miles limit generally recognised by Great Britain. 'Qui dontera,' says Vattel (I. § 28), 'que les pêcheries de Bahrein et de Ceylon ne puissent légitimement tomber en propriété?' And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the spot." This opinion of Westlake coincides with that contended by Great Britain during the Behring Sea Arbitration; see

Parliamentary Papers, United States, No. 4 (1893) Behring Sea Arbitration, Archives of His Majesty's Government, pp. 51 and 59. But it is submitted that the bed of the Open Sea is not a possible object of occupation. The explanation of the pearl fisheries off Ceylon and in the Persian Gulf being exclusively British is to be found in the fact that the freedom of the Open Sea was not a rule of International Law when these fisheries were taken possession of. See Oppenheim in Z.V. II. (1908), pp. 6-10, and Westlake, I. (2nd ed.), p. 203.

of the Police of the Fisheries in the North Sea outside the territorial waters¹ was signed by the representatives of all these States, Sweden-Norway excepted, to which the option of joining later on is given. This treaty contains the following stipulations:²—

(1) All the fishing vessels of the signatory Powers must be registered, and the registers have to be exchanged between the Powers (article 5). Every vessel has to bear visibly in white colour on black ground its number, name, and the name of its harbour (articles 6–11). Every vessel must bear an official voucher of her nationality (articles 12–13).

(2) To avoid conflicts between the different fishing vessels, very minute interdictions and injunctions are provided (articles 14–25).

(3) The supervision of the fisheries by the fishing vessels of the signatory Powers is exercised by special cruisers of these Powers (article 26). With the exception of those contraventions which are specially enumerated by article 27, all these cruisers are competent to verify all contraventions committed by the fishing vessels of all the signatory Powers (article 28). For that purpose they have the right of visit, search, and arrest (article 29). But a seized fishing vessel is to be brought into a harbour of her flag State and to be handed over to the authorities there (article 30). All contraventions are to be tried by the Courts of the State to which the contravening vessels belong (article 36); but in cases of a trifling character the matter can be compromised on the spot by the commanders of the special public cruisers of the Powers (article 33).

¹ Martens, N.R.G. 2nd Ser. IX. p. 556.

² The matter is exhaustively treated by Rykere, "*Le régime légal de la pêche maritime dans la Mer du Nord*" (1901). To carry out the obligations undertaken by her in the Convention for the regulation of the

fisheries in the North Sea, Great Britain enacted in 1883 the "Act to carry into effect an International Convention concerning the Fisheries in the North Sea, and to amend the Laws relating to British Sea Fisheries" (46 and 47 Vict. ch. 22).

§ 283. Connected with the regulation of the fisheries is the abolition of the liquor trade among the fishing vessels in the North Sea. Since serious quarrels and difficulties were caused through bumboats and floating grog-shops selling intoxicating liquors to the fishermen, an International Conference took place at the Hague in 1886, where the signatory Powers of the Hague Convention concerning the fisheries in the North Sea were represented. And on November 16, 1887, the International Convention concerning the Abolition of the Liquor Traffic among the fishermen in the North Sea was signed by the representatives of these Powers—namely, Great Britain, Belgium, Denmark, France, Germany, and Holland. This treaty¹ was, however, not ratified until 1894, and France did not ratify it at all. It contains the following stipulations:²—

Bumboats
in the
North Sea.

It is interdicted to sell spirituous drinks to persons on board of fishing vessels, and these persons are prohibited from buying such drinks (article 2). Bumboats, which wish to sell provisions to fishermen, must be licensed by their flag State and must fly a white flag³ with the letter S in black in the middle (article 3). The special cruisers of the Powers which supervise the fisheries in the North Sea are likewise competent to supervise the treaty stipulations concerning bumboats; they have the right to ask for the production of the proper licence, and eventually the right to arrest the vessel (article 7). But arrested vessels must always be brought into a harbour of their flag State, and all contraventions are to be tried by Courts of the flag State of the contravening vessel (articles 2, 7, 8).

§ 284. In 1886 a conflict arose between Great Britain

Seal
Fisheries

¹ See Martens, N.R.G. 2nd Ser. XIV. p. 540, and XXII. p. 563.

² The matter is treated by Guillaume in R.I., XXVI. (1894), p. 488.

³ This flag was agreed upon in the Protocol concerning the ratification of the Convention. (See Martens, N.R.G. 2nd Ser. XXII. p. 565.)

in
Behring
Sea.

and the United States through the seizure and confiscation of British-Columbian vessels which had hunted seals in the Behring Sea outside the American territorial belt, infringing regulations made by the United States concerning seal fishing in that sea. Great Britain and the United States concluded an arbitration treaty¹ concerning this conflict in 1892, according to which the arbitrators should not only settle the dispute itself, but also (article 7) "determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary" in the interest of the preservation of the seals. The Arbitration Tribunal, which assembled and gave its award² at Paris in 1893, imposed the duty upon both parties of forbidding their subjects to kill seals within a zone of sixty miles around the Pribiloff Islands; the killing of seals at all between May 1 and July 31 each year; seal-fishing with nets, firearms, and explosives; seal-fishing in other than specially licensed sailing vessels. Both parties in 1894 carried out this task imposed upon them.³ Other maritime Powers were at the same time asked by the United States to submit voluntarily to the regulations made for the parties by the arbitrators, but only Italy⁴ has agreed to this.

Experience has shown that the provisions made by the Arbitration Tribunal for the purpose of preventing the extinction of the seals in the Behring Sea are insufficient. The United States therefore invited the maritime Powers whose subjects are engaged in the seal fisheries to a Pelagic Sealing Conference which took place at Washington in 1911, and produced a convention⁵ which was signed on July 7, 1911, by which the

¹ See Martens, N.R.G. 2nd Ser. XVIII. p. 587.

² See Martens, N.R.G. 2nd Ser. XXI. p. 439. The award is discussed by Barclay in R.I. XXV. (1893), p. 417, and Engelhardt in R.I. XXVI. (1894), p. 386, and R.G. V. (1898), pp. 193 and 347. See also Tillier, "Les Pêcheries de Phoques de la

Mer de Behring" (1906), and Balch, "L'évolution de l'Arbitrage International" (1908), pp. 70-91.

³ See the Behring Sea Award Act, 1894 (57 Vict. c. 2).

⁴ See Martens, N.R.G. 2nd Ser. XXII. p. 624.

⁵ See below, § 593, No. 2.

suspension of pelagic sealing for fifteen years was agreed upon.

[No further details of this Convention are as yet known, and it has not yet been ratified.]

§ 285. For the purpose of regulating the fisheries outside territorial waters around the Farøe Islands and Iceland, Great Britain and Denmark signed on June 24, 1901, the Convention of London,¹ whose stipulations are for the most part literally the same as those of the International Convention for the Regulation of the Fisheries in the North Sea, concluded at the Hague in 1882.² The additional article of this Convention of London stipulates that any other State whose subjects fish around the Farøe Islands and Iceland may accede to it.

Fisheries around the Farøe Islands and Iceland.

VII

TELEGRAPH CABLES IN THE OPEN SEA

Bonfils, No. 583—Despagnet, No. 401—Pradier-Fodéré, V. No. 2548—Mérignhac, II. p. 532—Nys, II. p. 170—Rivier, I. pp. 244 and 386—Fiore, II. No. 822, and Code, Nos. 1134–1137—Stoerk in Holtzendorff, II. pp. 507–508—Liszt, § 29—Ullmann, § 103—Lauterbach, “Die Beschädigung unterseeischer Telegraphenkabel” (1889)—Landois, “Zur Lehre vom völkerrechtlichen Schutz der submarinen Telegraphenkabel” (1894)—Jouhannaud, “Les câbles sous-marins” (1904)—Renault, in R.I. XII. (1880), p. 251, XV. (1883), p. 17. See also the literature quoted below, vol. II., at the commencement of § 214.

§ 286. It is a consequence of the freedom of the Open Sea that no State can prevent another from laying telegraph and telephone cables in any part of the Open Sea, whereas no State need allow this within its territorial maritime belt. As numerous submarine cables have been laid, the question as to their protection arose. Already in 1869 the United States proposed an international convention for this purpose, but the matter

Telegraph cables in the Open Sea admitted.

¹ See Martens, N.R.G. 2nd Ser. XXXIII. (1906), p. 268. ² See above, § 282.

dropped in consequence of the outbreak of the Franco-German war. The Institute of International Law took up the matter in 1879¹ and recommended an international agreement. In 1882 France invited the Powers to an International Conference at Paris for the purpose of regulating the protection of submarine cables. This conference met in October 1882, again in October 1883, and produced the "International Convention for the Protection of Submarine Telegraph Cables" which was signed at Paris on April 16, 1884.²

The signatory Powers are:—Great Britain, Argentina, Austria-Hungary, Belgium, Brazil, Colombia, Costa Rica, Denmark, San Domingo, France, Germany, Greece, Guatemala, Holland, Italy, Persia, Portugal, Roumania, Russia, Salvador, Servia, Spain, Sweden-Norway, Turkey, the United States, and Uruguay. Colombia and Persia did not ratify the treaty, but, on the other hand, Japan acceded to it later on.

International
Protection
of Sub-
marine
Telegraph
Cables.

§ 287. The protection afforded to submarine telegraph cables finds its expression in the following stipulations of this international treaty:—

(1) Intentional or culpably negligent breaking or damaging of a cable in the Open Sea is to be punished by all the signatory Powers,³ except in the case of such damage having been caused in the effort of self-preservation (article 2).

(2) Ships within sight of buoys indicating cables which are being laid or which are damaged must keep at least a quarter of a nautical mile distant (article 6).

(3) For dealing with infractions of the interdictions and injunctions of the treaty the Courts of the flag State of the infringing vessel are exclusively competent (article 8).

(4) Men-of-war of all signatory Powers have a right

¹ See *Annuaire*, III. pp. 351–394.

² See the *Submarine Telegraph*

³ See *Martens*, N.R.G. 2nd Ser. Act, 1885 (48 & 49 Vict. c. 49).
XI. p. 281.

to stop and to verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty (article 10).

(5) All stipulations are made for the time of peace only and in no wise restrict the action of belligerents during time of war.¹

VIII

WIRELESS TELEGRAPHY ON THE OPEN SEA

Bonfils, Nos. 531^{10, 11}—Despagnet, 433 *quater*—Liszt, § 29—Ullmann, § 147—Meili, "Die drahtlose Telegraphie, &c." (1908)—Schneeli, "Drahtlose Telegraphie und Völkerrecht" (1908)—Landsberg, "Die drahtlose Telegraphie" (1909)—Kausen, "Die drahtlose Telegraphie im Völkerrecht" (1910)—Rolland in R.G. XIII. (1906), pp. 58–92—Fauchille in Annuaire, XXI. (1906), pp. 76–87—Meurer and Boidin in R.G. XVI. (1909), pp. 76 and 261.

§ 287*a*. To secure radio-telegraphic² communication between ships of all nations at sea and the continents, a Conference met at Berlin in 1906, where Great Britain, Germany, the United States of America, Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chili, Denmark, Spain, France, Greece, Italy, Japan, Mexico, Monaco, Norway, Holland, Persia, Portugal, Roumania, Russia, Sweden, Turkey, and Uruguay were represented, and where was signed on November 3, 1906, the International Radio-telegraphic Convention.³ This Convention, which consists of twenty-three articles, is accompanied by a Final Protocol, comprising six im-

Radio-telegraphy between ships and the shore.

¹ See below, vol. II. § 214, and art. 54 of the Hague rules concerning land warfare which enacts:—"Submarine cables connecting a territory occupied with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They also must be restored and indemnities for them regulated at the peace."

² See above, § 173, and below, §§ 464 and 582, No. 4.

³ See Martens, N.R.G. 3rd Ser.

III. (1910), p. 147. But not all the signatory Powers have as yet ratified the Convention, ratification having been given hitherto only by Great Britain, Austria-Hungary, Belgium, Brazil, Bulgaria, Denmark, France, Germany, Japan, Mexico, Monaco, Holland, Norway, Portugal, Roumania, Russia, Spain, Sweden and Turkey; and Tunis acceded to it. Italy has reserved ratification on account of her relations with the Marconi Wireless Telegraphy Co.

portant articles, and by Service Regulations, embodying fifty-two articles. The more important stipulations of the Convention are the following :—Coast Stations and ships are bound to exchange radio-telegrams reciprocally without regard to the particular system of radio-telegraphy adopted by them (article 3). Each of the contracting parties undertakes to cause its coast stations to be connected with the telegraph system by means of special wires, or at least to take such other measures as will ensure an expeditious exchange of traffic between the coast stations and the telegraph system (article 5). Radio-telegraph stations are bound to accept with absolute priority calls of distress from ships, to answer such calls with similar priority, and to take the necessary steps with regard to them (article 9). An International Bureau shall be established with the duty of collecting, arranging, and publishing information of every kind concerning radio-telegraphy, and for some other purposes mentioned in article 13.

Radio-
telegraphy
between
ships at
sea.

§ 287*b*. To secure radio-telegraphic communication between such ships at sea as possess installations for wireless telegraphy, an Additional Convention¹ to that mentioned above in § 287*a* was signed on November 3, 1906, by all the Powers who signed the forementioned Convention except by Great Britain, Italy, Japan, Mexico, Persia, and Portugal. According to this additional Convention all ships at sea which possess radio-telegraphic installations are compelled to exchange radio-telegrams reciprocally at all times without regard to the particular system of radio-telegraphy adopted.

It is to be hoped that in time all the Powers will accede to this Additional Convention, for its stipulation is of great importance in cases of shipwreck. If ships at sea can refuse to exchange radio-telegrams, it is im-

¹ See Martens, N.R.G. 3rd Ser. III. (1910), p. 158. But this Convention likewise has not yet been ratified by all the signatory Powers.

possible for them to render one another assistance. It ought not to be possible for the following case ¹ to occur, to which attention was drawn at the Berlin Conference by the delegate of the United States of America :—The American steamer *Lebanon* had received orders to search the Atlantic for a wrecked vessel which offered great danger to navigation. The *Lebanon* came within communicating reach of the liner *Vaderland*, and inquired by wireless telegraphy whether the *Vaderland* had seen the wreck. The *Vaderland* refused to reply to this question, on the ground that she was not permitted to enter into communication with a ship provided with a wireless apparatus other than the Marconi.

IX

THE SUBSOIL BENEATH THE SEA BED

§ 287c. The subsoil beneath the bed of the Open Sea requires special consideration on account of coal or other mines, tunnels, and the like, for the question is whether such buildings can be driven into that subsoil at all, and, if this can be done, whether they can be under the territorial supremacy of a particular State. The answer depends entirely upon the character in law of such subsoil. If the rules concerning the territorial subsoil ² would have analogously to be applied to the subsoil beneath the bed of the Open Sea, all rules concerning the Open Sea would necessarily have to be applied to the subsoil beneath its bed, and no part of this subsoil could ever come under the territorial supremacy of any State. It is, however, submitted ³ that it would not be rational to consider the subsoil beneath

Five rules concerning the subsoil beneath the Sea Bed.

¹ See Hazeltine, "The Law of the Air" (1911), p. 101.

² See above, §§ 173, 175.

³ See Oppenheim in Z.V. II. (1908), p. 11.

the bed of the Open Sea an inseparable appurtenance of the latter, such as the subsoil beneath the territorial land and water is. The rationale of the Open Sea being free and for ever excluded from occupation on the part of any State is that it is an international highway which connects distant lands and thereby secures freedom of communication, and especially of commerce, between such States as are separated by the sea.¹

There is no reason whatever for extending this freedom of the Open Sea to the subsoil beneath its bed. On the contrary, there are practical reasons—taking into consideration the building of mines, tunnels, and the like—which compel the recognition of the fact that this subsoil can be acquired through occupation. The following five rules recommend themselves concerning this subject:—

(1) The subsoil beneath the bed of the Open Sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt.

(2) This occupation takes place *ipso facto* by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the Open Sea.

(3) This occupation of the subsoil of the Open Sea can be extended up to the boundary line of the subsoil of the territorial maritime belt of another State, for no State has an exclusive claim to occupy such part of the subsoil of the Open Sea as is adjacent to the subsoil of its territorial maritime belt.

(4) An occupation of the subsoil beneath the bed of the Open Sea for a purpose which would endanger the freedom of the Open Sea is inadmissible.

(5) It is likewise inadmissible to make such arrangements in a part of the subsoil beneath the Open Sea which has previously been occupied for a legitimate

¹ See above, § 259.

purpose as would indirectly endanger the freedom of the Open Sea.

If these five rules are correct, there is nothing in the way of coal and other mines which are being exploited on the shore of a littoral State being extended into the subsoil beneath the Open Sea up to the boundary line of the subsoil beneath the territorial maritime belt of another State. Further, a tunnel which might be built between such two parts of the same State—for instance, between Ireland and Scotland—as are separated by the Open Sea would fall entirely under the territorial supremacy of the State concerned. On the other hand, for a tunnel between two different States separated by the Open Sea special arrangements by treaty would have to be made concerning the territorial supremacy over that part of the tunnel which runs under the bed of the Open Sea.

§ 287*d*. Since there is as yet no submarine tunnel in existence, it is of interest to give some details concerning the project of a Channel Tunnel¹ between Dover and Calais, and the preliminary arrangements between France and England concerning it. Already some years before the Franco-German War the possibility of such a tunnel was discussed, but it was not until 1874 that the first preliminary steps were taken. The subsoil of the Channel was geologically explored, plans were worked out, and a shaft of more than a mile long was tentatively bored from the English shore. And in 1876 an International Commission, appointed by the English and French Governments, and comprising three French and three English members, made a report on the construction and working of the proposed tunnel.² The report enclosed a memorandum, recommended by the

The
proposed
Channel
Tunnel.

¹ See Oppenheim in Z.V. II. (1908), pp. 1–16; Robin in R.G. XV. (1908), pp. 50–77; and Liszt, § 26.

² See Parliamentary Papers, C.

1576, Report of the Commissioners for the Channel Tunnel and Railway, 1876.

Commissioners to be adopted as the basis of a treaty between Great Britain and France concerning the tunnel, the juridically important articles of which are the following :—

(Article 1) The boundary between England and France in the tunnel shall be half-way between low-water mark (above the tunnel) on the coast of England, and low-water mark (above the tunnel) on the coast of France. The said boundary shall be ascertained and marked out under the direction of the International Commission to be appointed, as mentioned in article 4, before the Submarine Railway is opened for public traffic. The definition of boundary provided for by this article shall have reference to the tunnel and Submarine Railway only, and shall not in any way affect any question of the nationality of, or any rights of navigation, fishing, anchoring, or other rights in, the sea above the tunnel, or elsewhere than in the tunnel itself.

(Article 4) There shall be constituted an International Commission to consist of six members, three of whom shall be nominated by the British Government and three by the French Government

.

The International Commission shall . . . submit to the two Governments its proposals for Supplementary Conventions with respect—(a) to the apprehension and trial of alleged criminals for offences committed in the tunnel or in trains which have passed through it, and the summoning of witnesses; (b) to customs, police, and postal arrangements, and other matters which it may be found convenient so to deal with.

(Article 15) Each Government shall have the right to suspend the working of the Submarine Railway and the passage through the tunnel whenever such Govern-

ment shall, in the interest of its own country, think necessary to do so. And each Government shall have power, to be exercised if and when such Government may deem it necessary, to damage or destroy¹ the works of the tunnel or Submarine Railway, or any part of them, in the territory of such Government, and also to flood the tunnel with water.

In spite of this elaborate preparation the project could not be realised, since public opinion in England was for political reasons opposed to it. And although several times since—in 1880, 1884, 1888, and 1908—steps were again taken in favour of the proposed tunnel, public opinion in England remained hostile and the project has had for the time to be abandoned. It is, however, to be hoped and expected that ultimately the tunnel will be built when the political conditions which are now standing in the way of its realisation have undergone a change.

¹ This stipulation was proposed in the interest of defence in time of war. As regards the position of a

Channel Tunnel in time of war, see Oppenheim in Z.V. II. (1908), pp. 13–16.

CHAPTER III

INDIVIDUALS

I

POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

Lawrence, § 42—Taylor, § 171—Heffter, § 58—Stoerk in Holtzendorff, II. pp. 585–592—Gareis, § 53—Liszt, §§ 5 and 11—Ullmann, § 107—Bonfilis, Nos. 397–409—Despagnet, No. 328—Mérignhac, II. pp. 169–172—Pradier-Fodéré, I. Nos. 43–49—Fiore, II. Nos. 568–712—Martens, I. §§ 85–86—Jellinek, “System der subjectiven öffentlichen Rechte” (1892), pp. 310–314—Heilborn, “System,” pp. 58–138—Kaufmann, “Die Rechtskraft des Internationalen Rechtes” (1899)—Buonvino, “Diritto e personalità giuridica internazionale” (1910)—Rehm and Adler in Z.V. II. (1908), pp. 53–55 and 614–618—Kohler in Z.V. III. (1909), pp. 209–230—Diena in R.G. XVI. (1909), pp. 57–76.

Import-
ance of
Indi-
viduals to
the Law of
Nations.

§ 288. The importance of individuals to the Law of Nations is just as great as that of territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation. The individuals belonging to a State can and do come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals.

Indi-
viduals
never Sub-
jects of the
Law of
Nations.

§ 289. Now, what is the position of individuals in International Law according to these rules? Since the Law of Nations is a law between States only and exclusively, States only and exclusively¹ are subjects of the Law of Nations. How is it, then, that, although individuals are not subjects of the Law of Nations,

¹ See above, §§ 13 and 63.

they have certain rights and duties in conformity with or according to International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens certain rights according to the Law of Nations whilst on foreign territory? If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individual by the Law of Nations directly. For how could International Law, which is a law between States, give rights to individuals concerning their relations to a State? What the Law of Nations really does concerning individuals, is to impose the duty upon all the members of the Family of Nations to grant certain privileges to such foreign heads of States and diplomatic envoys, and certain rights to such foreign citizens as are on their territory. And, corresponding to this duty, every State has by the Law of Nations a right to demand that its head, its diplomatic envoys, and its simple citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws. International Law is indeed the background of these rights in so far as the duty to grant them is imposed upon the single States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with or according to International Law, if it is only remembered that these rights would not exist had the single States not created them by their Municipal Law.

And the same is valid as regards special rights of individuals in foreign countries according to special international treaties between two or more Powers. Although such treaties mostly speak of rights which individuals shall have as derived from the treaties them-

selves, this is nothing more than an inaccuracy of language. In fact, such treaties do not create these rights, but they impose the duty upon the contracting States of calling these rights into existence by their Municipal Laws.¹

Again, in those rare cases in which States stipulate by international treaties certain favours for individuals other than their own subjects, these individuals do not acquire any international rights under these treaties. The latter impose the duty only upon the State whose subjects these individuals are of calling those favours into existence by its Municipal Law. Thus, for example, when articles 5, 25, 35, and 44 of the Treaty of Berlin, 1878, made it a condition of the recognition of Bulgaria, Montenegro, Serbia, and Roumania, that these States should not impose any religious disability upon their subjects, the latter did not thereby acquire any international rights. Another instructive example² is furnished by article 5 of the Peace Treaty of Prague, 1866, between Prussia and Austria, which stipulated that the northern district of Schleswig should be ceded by Prussia to Denmark in case the inhabitants should by a plebiscite vote in favour of such cession. Austria, no doubt, intended to secure by this stipulation for the inhabitants of North Schleswig the opportunity of voting in favour of their union with Denmark. But these inhabitants did not thereby acquire any international right. Austria herself acquired only a right to insist upon Prussia granting to the inhabitants the opportunity of voting for the union with Denmark. Prussia, however, intentionally neglected her duty, Austria did not insist upon her right, and finally relinquished it by the Treaty of Vienna of 1878.³

¹ The whole matter is treated with great lucidity by Jellinek, "System der subjectiven öffentlichen Rechte" (1892), pp. 310-314, and Heilborn, "System," pp. 58-138.

² See Heilborn, "System," p. 67.

³ It ought to be mentioned that the opinion presented in the text concerning the impossibility for individuals to be subjects of International Law, which is now mostly upheld, is vigorously opposed by

Now it is maintained¹ that, although individuals cannot be subjects of International Law, they can nevertheless acquire rights and duties from International Law. But it is impossible to find a basis for the existence of such rights and duties. International rights and duties they cannot be, for international rights and duties can only exist between States. Likewise they cannot be municipal rights, for municipal rights and duties can only be created by Municipal Law. The opponents answer that such rights and duties nevertheless exist, and quote for example articles 4 and 5 of Convention XII. (concerning the establishment of an International Prize Court) of the second Hague Peace Conference, according to which individuals have a right to bring an appeal before the International Prize Court. But is this a real right? Is it not more correct to say that the home States of the individuals concerned have a right to demand that these individuals can bring the appeal before the Court? . . . Wherever International Law creates an independent organisation, such as the International Prize Court at the Hague or the European Danube Commission and the like, certain powers and claims must be given to the Courts and Commissions and the individuals concerned, but these powers and claims, and the obligations deriving therefrom, are neither international nor municipal rights and duties: they are powers, claims, and obligations existing only within the organisations concerned. To call them rights and duties—as indeed the respective treaties frequently do—is a laxity of language which is quite tolerable as long as one remembers that they neither comprise any relations between States nor any claims and obligations within the province of Municipal Law.

§ 290. But what is the real position of individuals Indi-
viduals

Kaufmann, "Die Rechtskraft des internationalen Rechtes" (1899), §§ 1-4, and a few others.

¹ See Diena in R.G. XVI. (1909),

pp. 57-76; Rehm and Adler in Z.V. I. (1908), pp. 53 and 614; Liszt, § 5; Kohler in Z.V. II. (1909), pp. 209-230.

Objects
of the
Law of
Nations.

in International Law, if they are not subjects thereof? The answer can only be that they are *objects* of the Law of Nations. They appear as such from many different points of view. When, for instance, the Law of Nations recognises the personal supremacy of every State over its subjects at home and abroad, these individuals appear just as much objects of the Law of Nations as the territory of the States does in consequence of the recognised territorial supremacy of the States. When, secondly, the recognised territorial supremacy of every State comprises certain powers over foreign subjects within its boundaries without their home State's having a right to interfere, these individuals appear again as objects of the Law of Nations. And, thirdly, when according to the Law of Nations any State may seize and punish foreign pirates on the Open Sea, or when belligerents may seize and punish neutral blockade-runners and carriers of contraband on the Open Sea without their home State's having a right to interfere, individuals appear here too as objects of the Law of Nations.¹

Nation-
ality the
Link
between
Indi-
viduals
and the
Law of
Nations.

§ 291. If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations. This is a fact which has its consequences over the whole area of International Law.² Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in

¹ Westlake, Chapters, p. 2, maintains that in these cases individuals appear as *subjects* of International Law; but I cannot understand upon what argument this assertion is

based. The correct standpoint is taken up by Lorimer, II. p. 131, and Holland, "Jurisprudence," p. 341.

² See below, § 294.

hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.¹ On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is a very important one for the Law of Nations, and that individuals enjoy benefits from this law not as human beings but as subjects of such States as are members of the Family of Nations. And so distinct is the position as subjects of these members from the position of stateless individuals and from subjects of States outside the Family of Nations, that it has been correctly characterised as a kind of international "indigenoussness," a *Völkerrechts-Indigenat*.² Just as municipal citizenship procures for an individual the enjoyment of the benefits of the Municipal Laws, so this international "indigenoussness," which is a necessary inference from municipal citizenship, procures the enjoyment of the benefits of the Law of Nations.

§ 292. Several writers³ maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind, without regarding whether an individual be stateless or not, or whether he be a subject of a member-State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration, and the like. But such rights do not in fact

The Law
of Nations .
and the
Rights of
Mankind.

¹ See below, § 312.

² See Stoerk in Holtzendorff, II. p. 588.

³ Bluntschli, §§ 360–363 and 370;

Martens, I. §§ 85 and 86; Fiore, I. Nos. 684–712, and Code, Nos. 614–669; Bonfilis, No. 397, and others.

enjoy any guarantee whatever from the Law of Nations,¹ and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law. But there are certain facts which cannot be denied at the background of this erroneous opinion. The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas which are some of them the basis of, others a development from, Christian morals, have a tendency to require the help of International Law for their realisation. When the Powers stipulated at the Berlin Congress of 1878 that the Balkan States should be recognised only under the condition that they did not impose any religious disabilities on their subjects, they lent their arm to the realisation of such an idea. Again, when the Powers after the beginning of the nineteenth century agreed to several international arrangements in the interest of the abolition of the slave trade,² they fostered the realisation of another of these ideas. And the innumerable treaties between the different States as regards extradition of criminals, commerce, navigation, copyright, and the like, are inspired by the idea of affording ample protection to life, health, and property of individuals. Lastly, there is no doubt that, should a State venture to treat its own subjects or a part thereof with

¹ The matter is treated with great lucidity by Heilborn, "System," pp. 83-138.

² It is incorrect to maintain that the Law of Nations has abolished slavery, but there is no doubt that the conventional Law of Nations has tried to abolish the slave trade. Three important general treaties have been concluded for that purpose during the nineteenth century, since the Vienna Congress—namely, (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia; (2) the

General Act of the Congo Conference of Berlin, 1885, whose article 9 deals with the slave trade; (3) the General Act of the anti-slavery Conference of Brussels, 1890, which is signed by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France, (see, however, below, § 517), Germany, Holland, Italy, Luxemburg, Persia, Portugal, Russia, Spain, Sweden, Norway, the United States, Turkey, and Zanzibar. See Queneuil, "De la traite des noirs et de l'esclavage" (1907).

such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention¹ for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation. However, a guarantee of the so-called rights of mankind cannot be found in all these and other facts. Nor do the actual conditions of life to which certain classes of subjects are forcibly submitted within certain States show that the Law of Nations really comprises such guarantee.²

II

NATIONALITY

Vattel, I. §§ 220–226—Hall, §§ 66 and 87—Westlake, I. pp. 213, 231–233—Halleck, I. p. 401—Taylor, §§ 172–178—Moore, III. §§ 372–376—Bluntschli, §§ 364–380—Stoerk in Holtzendorff, II. pp. 630–650—Gareis, § 54—Liszt, § 11—Ullmann, § 108—Bonfils, Nos. 433–454—Despagnet, Nos. 329–333—Pradier-Fodéré, III. No. 1645—Rivier, I. p. 303—Nys, II. pp. 214–220, 229–237—Calvo, II. §§ 539–540—Fiore, I. Nos. 644–658, 684–717, and Code, Nos. 638–641—Martens, I. §§ 85–87—Hall, “Foreign Powers and Jurisdiction” (1894), § 14—Cogordan, “La nationalité au point de vue des rapports internationaux” (2nd ed. 1890)—Gargas in Z.V. V. (1911), pp. 278–316 and . . .

§ 293. Nationality of an individual is his quality of being a subject of a certain State and therefore its citizen. It is not for International but for Municipal Law to determine who is and who is not to be considered a subject. And therefore it matters not, as far as the Law of Nations is concerned, that Municipal Laws may distinguish between different kinds of sub-

Concep-
tion of
Nation-
ality.

¹ See above, § 137.

² The reader may think of the sad position of the Jews within the Russian Empire. The treatment of the native Jews in Roumania, although the Powers have, according

to the spirit of article 44 of the Treaty of Berlin of 1878, a right of intervention, shows even more clearly that the Law of Nations does not guarantee what are called rights of mankind. See below, § 312.

jects—for instance, those who enjoy full political rights and are on that account named citizens, and those who are less favoured and are on that account not named citizens. Nor does it matter that according to the Municipal Laws a person may be a subject of a part of a State, for instance of a colony, but not a subject of the mother-country, provided only such person appears as a subject of the mother-country as far as the latter's international relations are concerned. Thus, a person naturalised in a British Colony is for all international purposes a British subject, although he may not have the rights of a British subject within the United Kingdom itself.¹ For all international purposes, all distinctions made by Municipal Laws between subjects and citizens and between different kinds of subjects have neither theoretical nor practical value, and the terms "subject" and "citizen" are, therefore, synonymously made use of in the theory and practice of International Law.

But it must be emphasised that nationality as citizenship of a certain State must not be confounded with nationality as membership of a certain nation in the sense of a race. Thus, all Englishmen, Scotchmen, and Irishmen are, despite their different nationality as regards their race, of British nationality as regards their citizenship. Thus, further, although all Polish individuals are of Polish nationality *qua* race, they have been, since the partition of Poland at the end of the eighteenth century between Russia, Austria, and Prussia, either of Russian, Austrian, or German nationality *qua* citizenship.

Function
of Nation-
ality.

§ 294. It will be remembered that nationality is

¹ See below, § 307, and Hall, "Foreign Powers and Jurisdiction," § 20, who quotes, however, a decision of the French Cour de Cassation according to which naturalisation in a British Colony does not constitute

a real naturalisation. But this decision is based on the Code Civil of France and has nothing to do with the Law of Nations. See also Westlake, I. pp. 231–233.

the link between individuals and the benefits of the Law of Nations.¹ This function of nationality becomes apparent with regard to individuals abroad, or property abroad of individuals who themselves are within the territory of their home State. Through one particular right and one particular duty of every State towards all other States this function of nationality becomes most conspicuous. The right is that of protection over its citizens abroad which every State holds and occasionally vigorously exercises towards other States; it will be discussed in detail below, § 319. The duty, on the other hand, is that of receiving on its territory such citizens as are not allowed to remain² on the territory of other States. Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of those expelled cannot refuse to receive them on the home territory, the expelling States having a claim on the home State that the latter do receive the expelled individuals.³

§ 295. Although nationality alone is the regular means through which individuals can derive benefit from the Law of Nations, there are two exceptional cases in which individuals may come under the international protection of a State without these individuals being really its subjects. It happens, first, that a State undertakes by an international agreement the diplomatic protection of another State's citizens abroad, and

So-called
Protégés
and *de*
facto Sub-
jects.

¹ See above, § 291.

² See below, § 326.

³ Beyond the right of protection and the duty to receive expelled citizens at home, the powers of a State over its citizens abroad in consequence of its personal supremacy illustrate the function of nationality. (See above, § 124.) Thus, the home State can tax citizens living abroad in the interest of home finance, can

request them to come home for the purpose of rendering military service, can punish them for crimes committed abroad, can categorically request them to come home for good (so-called *jus avocandi*). And no State has a right forcibly to retain foreign citizens called home by their home State, or to prevent them from paying taxes to their home State, and the like.

in this case the protected foreign subjects are named "protégés" of the protecting States. Such agreements are either concluded for a permanency as in the case of a small State, Switzerland for instance, having no diplomatic envoy in a certain foreign country where many of its subjects reside, or in time of war only, a belligerent handing over the protection of its subjects in the enemy State to a neutral State.

It happens, secondly, that a State promises diplomatic protection within the boundaries of Turkey and other Oriental countries to certain natives. Such protected natives are likewise named *protégés*, but they are also called "*de facto* subjects" of the protecting State. The position of these *protégés* is quite anomalous, it is based on custom and treaties, and no special rules of the Law of Nations itself are in existence concerning such *de facto* subjects. Every State which takes such *de facto* subjects under its protection can act according to its discretion, and there is no doubt that as soon as these Oriental States have reached a level of civilisation equal to that of the Western members of the Family of Nations, the whole institution of the *de facto* subjects will disappear.

Concerning the exercise of protection in Morocco, a treaty¹ was concluded at Madrid on July 3, 1880, signed by Morocco, Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Portugal, Spain, Sweden-Norway, and the United States of America, which sanctions the stipulations of the treaty of 1863 between France and Morocco concerning the same subject. According to this treaty the term "*protégé*" embraces² in relation to States of Capitulations only

¹ See Martens, N.R.G. 2nd Ser. VI. (1881), p. 624.

² See p. 56 of the official publication of the Award, given in 1905, of the Hague Court of Arbitration in the case of France v. Great

Britain concerning the Muscat Dhows.

It is of interest to note that the Court considers it a fact that the Powers have no longer the right to create *protégés* in unlimited numbers

the following classes of persons:—(1) Persons being subjects of a country which is under the protectorate of the Power whose protection they claim; (2) individuals corresponding to the classes enumerated in the treaties with Morocco of 1863 and 1880 and in the Ottoman law of 1863; (3) persons, who under a special treaty have been recognised as *protégés* like those enumerated by article 4 of the French Muscat Convention of 1844; and (4) those individuals who can establish that they had been considered and treated as *protégés* by the Power in question before the year in which the creation of new *protégés* was regulated and limited—that is to say, before the year 1863, these individuals not having lost the *status* they had once legitimately acquired.

§ 296. As emigration comprises the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality. Emigration is in fact entirely a matter of internal legislation of the different States. Every State can fix for itself the conditions under which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their nationality of birth. And it must be specially emphasised that the Law of Nations does not and cannot grant a right of emigration to every individual, although it is frequently maintained that it is a “natural”

Nation-
ality and
Emigra-
tion.

in any of the Oriental States, for the Award states on p. 56:—“Although the Powers have *expressis verbis* resigned the exercise of the pretended right to create ‘*protégés*’ in unlimited number only in relation to Turkey and Morocco, nevertheless the exercise of this pretended right

has been abandoned also in relation to other Oriental States, analogy having always been recognised as a means to complete the very deficient written regulations of the capitulations as far as circumstances are analogous.”

right of every individual to emigrate from his own State.¹

III

MODES OF ACQUIRING AND LOSING NATIONALITY

Vattel, I. §§ 212-219—Hall, §§ 67-72—Westlake, I. pp. 213-220—Lawrence, §§ 94-95—Halleck, I. pp. 402-418—Moore, III. §§ 372-473—Taylor, §§ 176-183—Walker, § 19—Bluntschli, §§ 364-373—Hartmann, § 81—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 592-630—Gareis, § 55—Liszt, § 11—Ullmann, §§ 110 and 112—Bonfilis, Nos. 417-432—Despagnet, Nos. 318-327—Pradier-Fodéré, III. Nos. 1646-1691—Rivier, I. pp. 303-306—Calvo, II. §§ 541-654, VI. §§ 92-117—Martens, II. §§ 44-48—Fiore, Code, Nos. 660-669—Foote, "Private International Jurisprudence" (3rd ed. 1904), pp. 1-52—Dicey, "Conflict of Laws" (1896), pp. 173-204—Martitz, "Das Recht der Staatsangehörigkeit im internationalen Verkehr" (1885)—Cogordan, "La nationalité, &c" (2nd ed. 1890), pp. 21-116, 317-400—Lapradelle, "De la nationalité d'origine" (1893)—Berney, "La nationalité à l'Institut de Droit International" (1897)—Bisocchi, "Acquisto e perdita della Nazionalità, &c." (1907)—Sieber, "Das Staatsbürggerecht in internationalem Verkehr," 2 vols. (1907)—Lehr, "La nationalité dans les principaux états du globe" (1909), and in R.I. 2nd Ser. X. (1908), pp. 285, 401, and 525.

In 1893 the British Government addressed a circular to its representatives abroad requesting them to send in a report concerning the laws relating to nationality and naturalisation in force in the respective foreign countries. These reports have been collected and presented to Parliament. They are printed in Martens, N.R.G. 2nd Ser. XIX. pp. 515-760.

Five
Modes of
Acquisition of
Nationality.

§ 297. Although it is for Municipal Law to determine who is and who is not a subject of a State, it is nevertheless of interest for the theory of the Law of Nations to ascertain how nationality can be acquired according to the Municipal Law of the different States. The reason of the thing presents five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, nevertheless all States practically do recognise them. They are birth, naturalisation, redintegration, subjugation, and cession.

¹ Attention ought to be drawn to the fact that, to ensure the protection of the interests of emigrants and immigrants from the moral, hygienic, and economic view, the Institute of International Law, at its meeting at Copenhagen in 1897, adopted a body

of fourteen principles concerning emigration under the heading "Vœux relatifs à la matière de l'émigration"; see Annuaire, XVI. (1897), p. 276. See also Gargas in Z. V. V. (1911), pp. 278-316.

§ 298. The first and chief mode of acquiring nationality is by birth, for the acquisition of nationality by another mode is exceptional only, since the vast majority of mankind acquires nationality by birth and does not change it afterwards. But no uniform rules exist according to the Municipal Law of the different States concerning this matter. Some States, as Germany and Austria, have adopted the rule that descent alone is the decisive factor,¹ so that a child born of their subjects becomes *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor.² According to this rule every child born on the territory of such State, whether the parents be citizens or aliens, becomes a subject of such State, whereas a child born abroad is foreign, although the parents may be subjects. Again, other States, as Great Britain³ and the United States, have adopted a mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad become their subjects, but also such children of alien parents as are born on their territory.

Acquisition of Nationality by Birth.

§ 299. The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term. Through naturalisation an alien by birth acquires the nationality of the naturalising State. According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, marriage, legitimation, option, acquisition of domicile, appointment as Government official, grant on application. Thus, according to the

Acquisition of Nationality through Naturalisation.

¹ *Jus sanguinis.*

² *Jus soli.*

³ See details concerning British

law on this point in Hall, "Foreign Powers and Jurisdiction" (1894), § 14.

Municipal Law of most States, an alien female marrying a subject of such State becomes thereby *ipso facto* naturalised. Thus, further, according to the Municipal Law of several States, an illegitimate child born of an alien mother, and therefore an alien himself, becomes *ipso facto* naturalised through the father marrying the mother and thereby legitimating the child.¹ Thus, thirdly, according to the Municipal Law of some States, which declare children of foreign parents born on their territory to be aliens, such children, if, after having come of age, they make a declaration that they intend to be subjects of the country of their birth, become *ipso facto* by such option naturalised. Again, fourthly, some States, such as Venezuela, let an alien become naturalised *ipso facto* by his taking his domicile² on their territory. Some States, fifthly, let an alien become naturalised *ipso facto* on appointment as a Government official. And, lastly, in all States naturalisation may be procured through a direct act on the part of the State granting nationality to an alien who has applied for it. This last kind of naturalisation is naturalisation in the narrower sense of the term; it is the most important for the Law of Nations, and, whenever one speaks of naturalisation pure and simple, such naturalisation through direct grant on application is meant; it will be discussed in detail below, §§ 303–307.

Acquisition of Nationality through Redintegration.

§ 300. The third mode of acquiring nationality is that by so-called redintegration or resumption. Such individuals as have been natural-born subjects of a State, but have lost their original nationality through naturalisation abroad or for some other cause, may

¹ English law has not adopted this rule.

² It is doubtful (see Hall, § 64) whether the home State of such individuals naturalised against their will must submit to this *ipso facto* naturalisation. See above, § 125,

where the rule has been stated that in consideration of the personal supremacy of the home State over its citizens abroad no State can naturalise foreigners against their will.

recover their original nationality on their return home. One speaks in this case of redintegration or resumption in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality. Thus, according to Section 10 of the Naturalisation Act,¹ 1870, a widow being a natural-born British subject, who has lost her British nationality through marriage with a foreigner, may at any time during her widowhood obtain a certificate of readmission to British nationality, provided she performs the same conditions and adduces the same evidence as is required in the case of an alien applying for naturalisation. And according to section 8 of the same Act, a British-born individual who has lost his British nationality through being naturalised abroad, may, if he returns home, obtain a certificate of readmission to British nationality, provided he performs the same conditions and adduces the same evidence as is required in the case of an alien applying for naturalisation.

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated as well as of the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory. These modes of acquisition of nationality are modes settled by the customary Law of Nations; it will be remembered that details concerning this matter have been given above, §§ 219 and 240.

Acquisition of Nationality through Subjugation and Cession.

§ 302. Although it is left in the discretion of the different States to determine the grounds on which individuals lose their nationality, it is nevertheless of interest for the theory of the Law of Nations to take notice of these grounds. Seven modes of losing nationality must be stated to exist according to the reason

Seven modes of losing Nationality.

¹ 33 and 34 Vict. c. 14.

of the thing, although all seven are by no means recognised by all the States. These modes are :—Release, deprivation, expiration, option, substitution, subjugation, and cession.

(1) Release. Some States, as Germany, give their citizens the right to ask to be released from their nationality. Such release, if granted, denationalises the released individual.

(2) Deprivation. According to the Municipal Law of some States, as, for instance, Bulgaria, Greece, Italy, Holland, Portugal, and Spain, the fact that a citizen enters into foreign civil or military service without permission of his Sovereign deprives him of his nationality.

(3) Expiration. Some States have legislated that citizenship expires in the cases of such of their subjects as have emigrated and stayed abroad beyond a certain length of time. Thus, a German ceases to be a German subject through the mere fact that he has emigrated and stayed abroad for ten years without having undertaken the necessary step for the purpose of retaining his nationality.

(4) Option. Some States, as Great Britain, which declare a child born of foreign parents on their territory to be their natural-born subject, although he becomes at the same time according to the Municipal Law of the home State of the parents a subject of such State, give the right to such child to make, after coming of age, a declaration that he desires to cease to be a citizen. Such declaration of alienage creates *ipso facto* the loss of nationality.

(5) Substitution. Many States, as, for instance, Great Britain, have legislated that the nationality of their subjects extinguishes *ipso facto* by their naturalisation abroad, be it through marriage, grant on application, or otherwise. Other States, however, as, for instance, Germany, do not object to their citizens acquiring

another nationality besides that which they already possess.

(6) Subjugation and cession. It is a universally recognised customary rule of the Law of Nations that the inhabitants of subjugated as well as ceded territory lose their nationality and acquire that of the State which annexes the territory.¹

IV

NATURALISATION IN ESPECIAL

Vattel, I. § 214—Hall, §§ 71–71*—Westlake, § I. pp. 225–230—Lawrence, §§ 95–96—Phillimore, I. §§ 325–332—Halleck, I. pp. 403–410—Taylor, §§ 181–182—Walker, § 19—Wharton, II. §§ 173–183—Moore, III. §§ 377–380—Wheaton, § 85—Bluntschli, §§ 371–372—Ullmann, §§ 110–111—Pradier-Fodéré, III. Nos. 1656–1659—Calvo, II. §§ 581–646—Martens, II. §§ 47–48—Stoicesco, “Étude sur la naturalisation” (1875)—Folleville, “Traité de la naturalisation” (1880)—Cogordan, “La nationalité, &c.” (2nd ed. 1890), pp. 117–284, 307–316—Delécaille, “De la naturalisation” (1893)—Henriques, “The Law of Aliens, &c.” (1906), pp. 91–121—Piggott, “Nationality and Naturalisation, &c.” 2 vols. (new ed. 1907)—Hart, in the *Journal of the Society of Comparative Legislation*, new series, vol. II. (1900), pp. 11–26.

§ 303. Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso facto* through (marriage, legitimation, option, domicile, and Government office)(see above, § 299)—must be defined as reception of an alien into the citizenship of a State through a formal act on application of the favoured individual. International Law does not provide any such rules for such reception, but it recognises the natural competence of every State as a Sovereign to increase its population through naturalisation, although a State might by its Municipal Law be prevented from making use of this natural competence.² In spite, however, of the fact that naturalisation is a domestic affair of the different States, it is nevertheless of special

Concep-
tion and
Import-
ance of
Naturali-
sation.

¹ See above, § 301. Concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality, see above, § 219.

² But there is, as far as I know, no civilised State in existence which abstains altogether from naturalising foreigners.

importance to the theory and practice of the Law of Nations. This is the case because naturalisation is effected through a special grant of the naturalising State, and regularly involves either a change or a multiplication of nationality, facts which can be and have been the source of grave international conflicts. In the face of the fact that millions of citizens emigrate every year from their home countries with the intention of settling permanently in foreign countries, where the majority of them become sooner or later naturalised, the international importance of naturalisation cannot be denied.

Object of
Naturali-
sation.

§ 304. The object of naturalisation is always an alien. Some States will naturalise such aliens only as are stateless because they never have been citizens of another State or because they have renounced, or have been released from or deprived of, the citizenship of their home State. But other States, as Great Britain, naturalise also such aliens as are and remain subjects of their home State. Most States naturalise such person only as has taken his domicile in their country, has been residing there for some length of time, and intends permanently to remain in their country. And according to the Municipal Law of many States, naturalisation of a married individual includes that of his wife and children under age. But although every alien may be naturalised, no alien has, according to the Municipal Law of most States, a claim to become naturalised, naturalisation being a matter of discretion of the Government, which can refuse it without giving any reasons.

Condi-
tions of
Naturali-
sation.

§ 305. If granted, naturalisation makes an alien a citizen. But it is left to the discretion of the naturalising State to grant naturalisation under any conditions it likes. Thus, for example, Great Britain grants naturalisation on the sole condition that the naturalised alien shall not be deemed to be a British subject when

within the limits of the foreign State of which he has been a subject previously to his naturalisation, unless at the time of naturalisation he has ceased to be a subject of that State. And it must be specially mentioned that naturalisation need not give an alien absolutely the same rights as are possessed by natural-born citizens. Thus according to article 2 of the Constitution of the United States of America a naturalised alien can never be elected President.¹

§ 306. Since the Law of Nations does not comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter of the Municipal Law of the States concerned. Some States, as Great Britain,² have legislated that one of their subjects becoming naturalised abroad loses thereby his previous nationality; but other States, as Germany, have not done this. Further, some States, as Great Britain again, deny every effect to the naturalisation granted by them to an alien whilst he is staying on the territory of the State whose subject he was previously to his naturalisation, unless at the time of naturalisation he was no longer a subject of such State. But other States do not make this provision. Be that as it may, there can be no doubt that a person who is naturalised abroad and temporarily or permanently returns into the country of his origin, can be held responsible³ for all acts done there at the time before his naturalisation abroad.

Effect of
Naturali-
sation
upon
previous
Citizen-
ship.

¹ A foreigner naturalised in Great Britain by Letters of Denization does not acquire the same rights as a natural-born British subject. See Hall, "Foreign Powers and Jurisdiction" (1894), § 22.

² Formerly Great Britain upheld the rule *nemo potest exuere patriam*, but Section 6 of the Naturalisation Act, 1870, does away with that rule. Its antithesis is the rule *ne quis invitatus civitate mutetur, neve in civitate*

maneant invitatus (Cicero, "Pro Balbo," c. 13, § 31; see Rattigan, "Private International Law" (1895), p. 29, No. 21).

³ Many instructive cases concerning this matter are reported by Wharton, II. §§ 180 and 181, and Moore, III. §§ 401-407. See also Hall, § 71, where details concerning the practice of many States are given with regard to their subjects naturalised abroad.

Naturalisation in Great Britain.

§ 307. The present law of Great Britain¹ concerning Naturalisation is mainly contained in the Naturalisation Acts of 1870, 1874, and 1895.² Aliens may on their application become naturalised by a certificate of naturalisation in case they have resided in the United Kingdom or have been in the service of the British Crown for a term of not less than five years, and in case they have the intention to continue residing within the United Kingdom or serving under the Crown. But naturalisation may be refused without giving a reason therefor (section 7). British possessions may legislate on their own account concerning naturalisation (section 16), and aliens so naturalised are for all international purposes³ British subjects. Where the Crown enters into a convention with a foreign State to the effect that the subjects of such State who have been naturalised in Great Britain may divest themselves of their status as British subjects, such naturalised British subjects can through a declaration of alienage shake off the acquired British nationality (section 3). Naturalisation of the husband includes that of his wife, and naturalisation of the father, or mother in case she is a widow, includes naturalisation of such children as have during infancy become resident in the United Kingdom at the time of their father's or mother's naturalisation (section 10). Neither the case of children who are not resident within the United Kingdom or not resident with their father in the service of the Crown abroad at the time of the naturalisation of their father or widowed mother, nor the case of children born abroad after the naturalisation of the father is mentioned in the Naturalisation Act. It is, therefore,

¹ As regards naturalisation in the United States of America, see Moore, III. §§ 381-389, and Dyne, "Naturalisation in the United States" (1907).

² 33 Vict. c. 14; 35 and 36 Vict. c. 39; 58 & 59 Vict. c. 43. See Foote, "Private International Jurisprudence," 3rd ed. (1904), pp. 1-51;

Westlake, "Private International Law," 4th ed. (1905), §§ 284-287; Dicey, "Conflict of Laws," 2nd ed. (1908), pp. 172-191.

³ See Hall, "Foreign Powers and Jurisdiction," §§ 20 and 21, especially concerning naturalisation in India.

to be taken for granted that such children are not¹ British subjects, except children born of a naturalised father abroad in the service of the Crown.²

Not to be confounded with naturalisation proper is naturalisation through *denization* by means of Letters Patent under the Great Seal. This way of making an alien a British subject is based on a very ancient practice³ which has not yet become obsolete. Such denization requires no previous residence within the United Kingdom. "A person may be made a denizen without ever having set foot upon British soil. There have been, and from time to time there no doubt will be, persons of foreign nationality to whom it is wished to entrust functions which can only be legally exercised by British subjects. In such instances, the condition of five years' residence in the United Kingdom would generally be prohibitory. The difficulty can be avoided by the issue of Letters of Denization; and it is believed that on one or two occasions letters have in fact been issued with the view of enabling persons of foreign nationality to exercise British consular jurisdiction in the East." (Hall.)

V

DOUBLE AND ABSENT NATIONALITY

Hall, § 71—Westlake, I. pp. 221-225—Lawrence, § 96—Halleck, I. pp. 410-413—Taylor, § 183—Wheaton, § 85 (Dana's note)—Moore, III. §§ 426-430—Bluntschli, §§ 373-374—Hartmann, § 82—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 650-655—Ullmann, § 110—Bonfils, No. 422—Pradier-Fodéré, III. Nos. 1660-1665—Rivier, I. pp. 304-306—Calvo, II. §§ 647-654—Martens, II. § 46.

§ 308. The Law of Nations having no rule concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation

Possibility
of Double
and
Absent
Nation-
ality.

¹ See Hall, "Foreign Powers and Jurisdiction," § 19.

² See Naturalisation Act, 1895 (58 & 59 Vict. c. 43).

³ See Hall, "Foreign Powers and Jurisdiction," § 22.

and cession, and, on the other hand, the Municipal Laws of the different States differing in many points concerning this matter, the necessary consequence is that an individual may own two different nationalities as easily as none at all. The points to be discussed here are therefore: how double nationality occurs, the position of individuals with double nationality, how absent nationality occurs, the position of individuals destitute of nationality, and, lastly, means of redress against difficulties arising from double and absent nationality.

It must, however, be specially mentioned that the Law of Nations is concerned with such cases only of double and absent nationality as are the consequences of conflicting Municipal Laws of several absolutely different States. Such cases as are the consequence of the Municipal Laws of a Federal State or of a State which, as Great Britain, allows outlying parts to legislate on their own account concerning naturalisation, fall outside the scope of the Law of Nations. Thus the fact that, according to the law of Germany, a German can be at the same time a subject of several member-States of the German Empire, or can be a subject of this Empire without being a subject of one of its member-States, does as little concern the Law of Nations as the fact that an individual can be a subject of a British Colonial State without at the same time being a subject of the United Kingdom. For internationally such individuals appear as subjects of such Federal State or the mother-country, whatever their position may be inside these States.

How
Double
Nation-
ality
occurs.

§ 309. An individual may own double nationality knowingly or unknowingly, and with or without intention. And double nationality may be produced by every mode of acquiring nationality. Even birth can vest a child with double nationality. Thus, every child

born in Great Britain of German parents acquires at the same time British and German nationality, for such child is British according to British, and German according to German Municipal Law. Double nationality can likewise be the result of marriage. Thus, a Venezuelan woman marrying an Englishman acquires according to British law British nationality, but according to Venezuelan law she does not lose her Venezuelan nationality. Legitimation of illegitimate children can produce the same effect. Thus, an illegitimate child of a German born in England of an English mother is a British subject according to British and German law, but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing his British nationality, although the mother does lose her British nationality.¹ Again, double nationality may be the result of option. Thus, a child born in France of German parents acquires German nationality, but if, after having come of age, he acquires French nationality by option through making the declaration necessary according to French Municipal Law, he does not thereby, according to German Municipal Law, lose his German nationality. It is not necessary to give examples of double nationality caused by taking domicile abroad, accepting foreign Government office, and redintegration, and it suffices merely to draw attention to the fact that naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply for and receive naturalisation in a State without thereby losing the nationality of their home State.

§ 310. Individuals owning double nationality bear

Position
of Indi-
viduals

¹ This is the consequence of Section 10, Nos. 1 and 3, of the Naturalisation Act, 1870.

with
Double
Nation-
ality.

in the language of diplomatists the name *sujets mixtes*. The position of such "mixed subjects" is awkward on account of the fact that two different States claim them as subjects, and therefore their allegiance. In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals. It is all very well to say that such conflict is a personal matter which concerns neither the Law of Nations nor the two States in dispute. As far as an individual has, through naturalisation, option, and the like, acquired his double nationality, one may say that he has placed himself in that awkward position by intentionally and knowingly acquiring a second without being released from his original nationality. But those who are natural-born *sujets mixtes* in most cases do not know thereof before they have to face the conflict, and their difficult position is not their own fault.

Be that as it may, there is no doubt that each of the States claiming such an individual as subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject.¹ But against third States each of them appears as his Sove-

¹ I cannot agree with the statement in its generality made by Westlake, I. p. 221:—"If, for instance, a man claimed as a national both by the United Kingdom and by another country should contract in the latter a marriage permitted by its laws to its subjects, an English Court would have to accept him as a married man." If this were correct, the marriage of a German who, without having given up his German citizenship, has become naturalised in Great Britain and has afterwards married his niece in Germany, would have to be recognised as legal by the English Courts. The correct solution seems to me to be that such marriage is legal in Germany, but not legal in

England, because British law does not admit of marriage between uncle and niece. The case is different when a German who marries his niece in Germany, afterwards takes his domicile and becomes naturalised in England; in this case English Courts would have to recognise the marriage as legal because German law does not object to a marriage between uncle and niece, and because the marriage was concluded before the man took his domicile in England and became a British subject. See Foote, "Private International Jurisprudence," 3rd ed. (1904), p. 106, and the cases there cited.

reign, and it is therefore possible that each of them can exercise its right of protection over him within third States.

§ 311. An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality because according to German law he does not acquire German nationality, and according to British law he does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless. But statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality.

How
Absent
Nation-
ality
occurs.

§ 312. That stateless individuals are objects of the Law of Nations in so far as they fall under the territorial supremacy of the State on whose territory they live there is no doubt whatever. But since they do not own a nationality, the link¹ by which they could derive benefits from International Law is missing, and thus they lack any protection whatever as far as this law is concerned. The position of such individuals destitute of nationality may be compared to vessels on the Open Sea not sailing under the flag of a State, which likewise do not enjoy any protection whatever. In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States, but as a point of international legality there is no restriction whatever upon a State's maltreating them to any extent.²

Position
of Indi-
viduals
destitute
of Nation-
ality.

¹ See above, § 291.

² The position of the Jews in Roumania furnishes a sad example. According to Municipal Law they

are, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of article 44 of the Treaty of Berlin,

Redress
against
Difficul-
ties aris-
ing from
Double
and
Absent
Nation-
ality.

§ 313. Double as well as absent nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of stateless individuals increases much within a certain State, the latter can require them to apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will, or has a right to, interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal as well as in International Law. Much more difficult is it, however, to find, within the limits of the present rules of the Law of Nations, means of redress against conflicts arising from double nationality. Very grave disputes indeed have occasionally occurred between States on account of individuals who were claimed as subjects by both sides. Thus, in 1812, a time when England still kept to her old rule that no natural-born English subject could lose his nationality, the United States went to war with England because the latter impressed Englishmen naturalised in America from on board American merchantmen, claiming the right to do so, as according to her law these men were still English citizens. Thus, further, Prussia frequently had during the sixties of the last century disputes with the United States on account of Prussian individuals who, without having rendered military service at home, had emigrated to America to become there naturalised and had afterwards returned to Prussia.¹ Again, during

1878, according to which no religious disabilities may be imposed by Roumania upon her subjects. But as these Jews are not subjects of any other State, Roumania compels them to render military service, and actually treats them in every way according to discretion without any foreign State being able to exercise a right

of protection over them. See Rey in R.G. X. (1903), pp. 460-526, and Bar in R.I. 2nd Ser. IX. (1907), pp. 711-716. See also above, § 293, p. 369, note 2.

¹ The case of Martin Koszta ought here to be mentioned, details of which are reported by Wharton, II. § 175; Moore, III. §§ 490-491, and

the time of the revolutionary movements in Ireland in the last century before the Naturalisation Act of 1870 was passed, disputes arose between Great Britain and the United States on account of such Irishmen as took part in these revolutionary movements after having become naturalised in the United States.¹ It would seem that the only way in which all the difficulties arising from double and absent nationality could really be done away with is for all the Powers to agree upon an international convention, according to which they undertake the obligation to enact by their Muni-

Martens, "Causes Célèbres," V. pp. 583-599. Koszta was a Hungarian subject who took part in the revolutionary movement of 1848, escaped to the United States, and in July, 1852, made a declaration under oath, before a proper tribunal, of his intention to become naturalised there. After remaining nearly two years in the United States, but before he was really naturalised, he visited Turkey, and obtained a *tezkerch*, a kind of letter of safe-conduct, from the American Chargé d'Affaires at Constantinople. Later on, while at Smyrna, he was seized by Austrian officials and taken on board an Austrian man-of-war with the intention of bringing him to Austria, to be there punished for his part in the revolution of 1848. The American Consul demanded his release, but Austria maintained that she had a right to arrest Koszta according to treaties between her and Turkey. Thereupon the American man-of-war *Saint Louis* threatened to attack the Austrian man-of-war in case she would not give up her prisoner, and an arrangement was made that Koszta should be delivered into the custody of the French Consul at Smyrna until the matter was settled between the United States and Austrian Governments. Finally, Austria consented to Koszta's being brought back to America. Although Koszta was not yet naturalised, the United States claimed a right of protection over him, since he had taken his domicile on her territory with the intention to become there naturalised in due time, and had thereby in a

sense acquired the national character of an American.

¹ The United States have, through the so-called "Bancroft Treaties," attempted to overcome conflicts arising from double nationality. The first of these treaties was concluded in 1868 with the North German Confederation, the precursor of the present German Empire, and signed on behalf of the United States by her Minister in Berlin, George Bancroft. (See Wharton, II. §§ 149 and 179, and Moore, III. §§ 391-400.) In the same and the following years treaties of the same kind were concluded with many other States, the last with Portugal in 1908. A treaty of another kind, but with the same object, was concluded between the United States and Great Britain on May 13, 1870. (See Martens, N.R.G. XX. p. 524, and Moore, III. § 397.) All these treaties stipulate that naturalisation in one of the contracting States shall be recognised by the other, whether the naturalised individual has or has not previously been released from his original citizenship, provided he has resided for five years in such country. And they further stipulate that such naturalised individuals, in case they return after naturalisation into their former home State and take their residence there for some years, either *ipso facto* become again subjects of their former home State and cease to be naturalised abroad (as the Bancroft Treaties), or can be reinstated in their former citizenship, and cease thereby to be naturalised abroad (as the treaty with Great Britain).

cial Law such corresponding rules regarding acquisition and loss of nationality as make the very occurrence of double and absent nationality impossible.¹

VI

RECEPTION OF ALIENS AND RIGHT OF ASYLUM

Vattel, II. § 100—Hall, §§ 63–64—Westlake, I. pp. 208–210—Lawrence, §§ 97–98—Phillimore, I. §§ 365–370—Twiss, I. § 238—Halleck, I. pp. 452–454—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Wheaton, § 115, and Dana's Note—Moore, IV. §§ 560–566—Bluntschli, §§ 381–398—Hartmann, §§ 84–85, 89—Heffter, §§ 61–63—Stoerk in Holtzendorff, II. pp. 637–650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 113–115—Bonfilis, Nos. 441–446—Despagnet, Nos. 339–343—Rivier, I. pp. 307–309—Nys, II. pp. 232–237—Calvo, II. §§ 701–706, VI. 119—Martens, II. § 46—Overbeck, "Niederlassungsfreiheit und Ausweisungsrecht" (1906); Henriques, "The Law of Aliens, &c." (1906)—Sibley and Elias, "The Aliens Act, &c." (1906)—Proceedings of the American Society of International Law, 1911, pp. 65–115.

No Obligation to admit Aliens.

§ 314. Many writers² maintain that every member of the Family of Nations is bound by International Law to admit all aliens into its territory for all lawful purposes, although they agree that every State could exclude certain classes of aliens. This opinion is generally held by those who assert that there is a fundamental right of intercourse between States. It will be remembered³ that no such fundamental right exists, but that intercourse is a characteristic of the position of the States within the Family of Nations and therefore a presupposition of the international personality of every State. A State, therefore, cannot exclude aliens altogether from its territory without violating the spirit of the Law of Nations and endangering its very membership of the Family of Nations. But no State actually does exclude aliens altogether. The question is only whether an international legal duty can be said

¹ The Institute of International Law has studied the matter, and formulated at its meeting in Venice in 1896 six rules, which, if adopted on the part of the different States,

would do away with many of the difficulties. (See *Annuaire*, XV. p. 270.)

² See, for instance, Bluntschli, § 381, and Liszt, § 25.

³ See above, § 141.

to exist for every State to admit all unobjectionable aliens to all parts of its territory. And it is this duty which must be denied as far as the customary Law of Nations is concerned. It must be emphasised that, apart from general conventional arrangements, as, for instance, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship, and the like, no State can claim the right for its subjects to enter into and reside on the territory of a foreign State. The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory. And it is only by an inference of this competence that Great Britain,¹ the United States of America, and other States have made special laws according to which paupers and criminals, as well as diseased and other objectionable aliens, are prevented from entering their territory. Every State is and must remain master in its own house, and such mastership is of especial importance with regard to the admittance of aliens. Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act, against which retorsion would be admissible; but it cannot be denied that a State is competent to do this, although in practice such wholesale exclusion will never happen. Hundreds of treaties of commerce and friendship exist between the members of the Family of Nations according to which they are obliged to receive each other's unobjectionable subjects, and thus practically the matter is settled, although in strict law every State is competent to exclude foreigners from its territory.²

¹ See the Aliens Act, 1905 (5 Edw. VII. c. 13). See also Henriques, "The Law of Aliens, &c." (1906), and Sibley and Elias. "The Aliens Act, &c." (1906).

² The Institute of International Law has studied the matter, and

adopted, at its meeting at Geneva in 1892 (see *Annuaire*, XII. p. 219), a body of forty-one articles concerning the admission and expulsion of aliens; articles 6-13 deal with the admittance of aliens.

Reception
of Aliens
under
condi-
tions.

§ 315. It is obvious that, if a State need not receive aliens at all, it can, on the other hand, receive them under certain conditions only. Thus, for example, Russia does not admit aliens without passports, and if the alien adheres to the Jewish faith he has to submit to a number of special restrictions. Thus, further, during the time Napoleon III. ruled in France, every alien entering French territory from the sea or from neighbouring land was admitted only after having stated his name, nationality, and the place to which he intended to go. Some States, as Switzerland, make a distinction between such aliens as intend to settle down in the country and such as intend only to travel in the country; no alien is allowed to settle in the country without having asked and received a special authorisation on the part of the Government, whereas the country is unconditionally open to all mere travelling aliens.

So-called
Right of
Asylum.

§ 316. The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or aliens, excludes the prosecution of aliens thereon by foreign States. Thus, a foreign State is, provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier. In the absence of extradition treaties stipulating the contrary, no State is by International Law obliged to refuse admittance into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State. On the contrary, States have always upheld their competence to grant asylum if they choose to do so. Now the so-called right of asylum is certainly not a right of the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution from some other State should grant protection and asylum. For such State need not grant them. The so-called right of asylum is nothing but the competence

mentioned above of every State, and inferred from its territorial supremacy, to allow a prosecuted alien to enter and to remain on its territory under its protection, and to grant thereby an asylum to him. Such fugitive alien enjoys the hospitality of the State which grants him asylum; but it might be necessary to place him under surveillance, or even to intern him at some place in the interest of the State which is prosecuting him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State. And if a State grants asylum to a prosecuted alien, this duty becomes of special importance.

VII

POSITION OF ALIENS AFTER RECEPTION

Vattel, I. § 213, II. §§ 101-115—Hall, §§ 63 and 87—Westlake, I. pp. 211-212, 313-316—Lawrence, §§ 97-98—Phillimore, I. §§ 332-339—Twiss, I. § 163—Taylor, §§ 173, 187, 201-203—Walker, § 19—Wharton, II. §§ 201-205—Wheaton, § 77-82—Moore, IV. §§ 534-549—Bluntschli, §§ 385-393—Hartmann, §§ 84-85—Heffter, § 62—Stoerk in Holtzendorff, II. pp. 637-650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 113-115—Bonfils, Nos. 447-454—Despagnet, Nos. 339-343—Rivier, I. pp. 309-311—Calvo, II. §§ 701-706—Martens, II. § 46—Gaston de Leval, "De la protection des nationaux à l'étranger" (1907)—Wheeler in A.J. III. (1909), pp. 869-884—Proceedings of the American Society of International Law, 1911, pp. 32-65, 150-225.

§ 317. With his entrance into a State, an alien, unless he belongs to the class of those who enjoy so-called extritoriality, falls at once under such State's territorial supremacy, although he remains at the same time under the personal supremacy of his home State. Such alien is therefore under the jurisdiction of the State in which he stays, and is responsible to such State for all acts he commits on its territory. He is further subjected to all administrative arrangements of such State which concern the very locality where the alien is. If in consequence of a public calamity, such

Aliens
subjected
to Terri-
torial Su-
premacy.

as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all aliens as well as against citizens. But apart from jurisdiction and mere local administrative arrangements, both of which concern all aliens alike, a distinction must be made between such aliens as are merely travelling and stay, therefore, only temporarily on the territory, and such as take their residence there either permanently or for some length of time. A State has wider power over aliens of the latter kind ; it can make them pay rates and taxes, and can even compel them in case of need, under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, an alien does not fall under the personal supremacy of the local State ; therefore he cannot be made to serve¹ in its army or navy, and cannot, like a citizen, be treated according to discretion.

It must be emphasised that an alien is responsible to the local State for all illegal acts which he commits while the territory concerned is during war temporarily occupied by the enemy. An illustrative case is that of *De Jager v. the Attorney-General for Natal*.² De Jager was a burgher of the South African Republic, but a settled resident at Natal when the South African War broke out. In October 1899 the British forces evacuated that part of Natal in which Waschbank, where he lived, is situated, and the Boer forces were in occupation for some six months. He joined them, and served in different capacities until March 1900, when he went to the Transvaal, and took no further part in the war.

¹ See, however, above, § 127, concerning the attitude of Great Britain with regard to aliens in British colonies.

² L.R. [1907] App. C., 326. See

Baty in *The Law Magazine and Review*, XXXIII. (1908), pp. 214-218, who disapproves of the conviction of De Jager.

He was tried in March 1901, and convicted of high treason, and sentenced to five years' imprisonment and a fine of £5000, or, failing payment thereof, to a further three years.

§ 318. The rule that aliens fall under the territorial supremacy of the State they are in finds an exception in Turkey and, further, in such other Eastern States, like China, as are, in consequence of their deficient civilisation, only for some parts members of the Family of Nations. Aliens who are subjects of Christian States and enter into the territory of such Eastern States, remain wholly under the jurisdiction¹ of their home State. This exceptional condition of things is based, as regards Turkey, on custom and treaties which are called Capitulations, as regards other Eastern States on treaties only.² Jurisdiction over aliens in these countries is exercised by the consuls of their home States, which have enacted special Municipal Laws for that purpose. Thus, Great Britain has enacted so-called Foreign Jurisdiction Acts at several times, which are now all consolidated in the Foreign Jurisdiction Act of 1890.³ It must be specially mentioned that Japan has since 1899 ceased to belong to the Eastern States in which aliens are exempt from local jurisdiction.

Aliens
in Eastern
Countries.

§ 319. Although aliens fall at once under the territorial supremacy of the State they enter, they remain nevertheless under the protection of their home State. By a universally recognised customary rule of the Law of Nations every State holds a right of protection over its citizens abroad, to which corresponds the duty

Aliens
under the
Protection
of their
Home
State.

¹ See below, § 440.

² See Twiss, I. § 163, who enumerates many of these treaties; see also Phillimore, I. §§ 336–339; Hall, "Foreign Powers and Jurisdiction," §§ 59–91; and Scott, "The Law affecting Foreigners in Egypt as the Result of the Capitulations" (1907).

³ 53 & 54 Vict. c. 37. See Piggott, "Exterritoriality. The Law relating

to Consular Jurisdiction, &c.," new edition (1907).

⁴ This right has, I believe, grown up in furtherance of intercourse between the members of the Family of Nations (see above, § 142); Hall (§ 87) and others deduce this indubitable right from the "fundamental" right of self-preservation.

of every State to treat foreigners on its territory with a certain consideration which will be discussed below, §§ 320–322. The question here is only when and how this right of protection can be exercised.¹ Now there is certainly, as far as the Law of Nations is concerned, no duty incumbent upon a State to exercise its protection over its citizens abroad. The matter is absolutely in the discretion of every State, and no citizen abroad has by International Law, although he may have it by Municipal Law, a right to demand protection from his home State. Often for political reasons States have in certain cases refused the exercise of their right of protection over citizens abroad. Be that as it may, every State *can* exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time, or by such State's officials or citizens without such State's interfering for the purpose of making good the wrong done.² And this right can be realised in several ways. Thus, a State whose subjects are wronged abroad can diplomatically insist upon the wrongdoers being punished according to the law of the land and upon damages, if necessary, being paid to its subjects concerned. It can, secondly, exercise retorsion and reprisals for the purpose of making the other State comply with its demands. It can, further, exercise intervention, and it can even go to war when necessary. And there are other means besides those mentioned. It is, however, quite impossible to lay down hard-and-fast rules as regards the

¹ See Moore, VI. §§ 979–997, and Wheeler in A.J. III. (1909), pp. 869–884.

² Concerning the responsibility of a State for internationally injurious acts of its own, its organs and other officials, and its subjects, see above, §§ 151–167, and Anzilloti in R.G. XIII. (1906), pp. 5 and 285. The

right of protection over citizens abroad is discussed in detail by Hall, § 87, Westlake, I. pp. 313–320, and Gaston de Leval, op. cit. Concerning the right of protection of a State over its citizens with regard to public debts of foreign States, see above, §§ 135 (6) and 155.

question in which way and how far in every case the right of protection ought to be exercised. Everything depends upon the merits of the individual case and must be left to the discretion of the State concerned. The latter will have to take into consideration whether the wronged alien was only travelling through or had settled down in the country, whether his behaviour had been provocative or not, how far the foreign Government identified itself with the acts of officials or subjects, and the like.

§ 320. Under the influence of the right of protection over its subjects abroad which every State holds, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien, provided he owns a nationality at all, cannot be outlawed in foreign countries, but must be afforded protection of his person and property. The home State of the alien has by its right of protection a claim upon such State as allows him to enter its territory that such protection shall be afforded, and it is no excuse that such State does not provide any protection whatever for its own subjects. In consequence thereof every State is by the Law of Nations compelled, at least, to grant to aliens equality before the law with its citizens as far as safety of person and property is concerned. An alien must in especial not be wronged in person or property by the officials and Courts of a State. Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, Courts of Justice must treat him justly and in accordance with the law. Corrupt administration of the law against natives is no excuse for the same against aliens, and no Government can cloak itself with the judgment of corrupt judges.

Protec-
tion to be
afforded
to Aliens'
Persons
and
Property.

§ 321. Apart from protection of person and property, every State can treat aliens according to discretion, those points excepted concerning which discretion is

How far
Aliens
can be
treated

according
to Dis-
cretion.

restricted through international treaties between the States concerned. Thus, a State can exclude aliens from certain professions and trades; it can, as Great Britain did formerly and Russia does even to-day, exclude them from holding real property; it can, as again Great Britain¹ did in former times, compel them to have their names registered for the purpose of keeping them under control, and the like. It must, however, be stated that there is a tendency within all the States which are members of the Family of Nations to treat admitted aliens more and more on the same footing as citizens, political rights and duties, of course, excepted. Thus, for instance, with the only exception that an alien cannot be sole or part owner of a British ship, aliens having taken up their domicile in this country are for all practical purposes treated by the law² of the land on the same footing as British subjects.

Departure
from the
Foreign
Country.

§ 322. Since a State holds territorial only, but not personal supremacy over an alien within its boundaries, it can never under any circumstances prevent him from leaving its territory, provided he has fulfilled his local obligations, as payment of rates and taxes, of fines, of private debts, and the like. And an alien leaving a State can take all his property away with him, and a tax for leaving the country or tax upon the property he takes away with him³ cannot be levied. And it must be specially mentioned that since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past; this is the name of the right, which was formerly frequently exercised, of a State to confiscate the whole estate of an alien deceased on its territory.⁴ But if a State levies estate duties in the case of a citizen

¹ See an Act for the Registration of Aliens, &c., 1836 (6 & 7 William IV. c. 11).

² That aliens cannot now any longer belong to the London Stock Exchange, is an outcome not of

British Municipal Law, but of regulations of the Stock Exchange.

³ So-called *gabella emigrationis*.

⁴ See details in Wheaton, § 82. The *droit d'aubaine* was likewise named *jus albinagii*.

dying on its territory, as Great Britain does according to the Finance Act¹ of 1894, such duties can likewise be levied in case of an alien dying on its territory.

VIII

EXPULSION OF ALIENS

Hall, § 63—Westlake, I. p. 210—Phillimore, I. § 364—Halleck, I. pp. 460–461—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Moore, IV. §§ 550–559—Bluntschli, §§ 383–384—Stoerk in Holtzendorff, II. pp. 646–656—Ullmann, § 115—Bonfils, No. 442—Despagnet, Nos. 336–337—Pradier-Fodéré, III. Nos. 1857–1859—Rivier, I. pp. 311–314—Nys, II. pp. 229–287—Calvo, VI. §§ 119–125—Fiore, Code, Nos. 252–259—Martens, I. § 79—Bleteau, “De l’asile et de l’expulsion” (1886)—Berc, “De l’expulsion des étrangers” (1888)—Féraud-Giraud, “Droit d’expulsion des étrangers” (1889)—Langhard, “Das Recht der politischen Fremdenausweisung” (1891)—Overbeck, “Niederlassungsfreiheit und Ausweisungsrecht” (1906)—Rolin-Jaequemyns in R.I. XX. (1888), pp. 499 and 615—Proceedings of the American Society of International Law, 1911, pp. 119–149.

§ 323. Just as a State is competent to refuse admittance to an alien, so it is, in conformity with its territorial supremacy, competent to expel at any moment an alien who has been admitted into its territory. And it matters not whether the respective individual is only on a temporary visit or has settled down for professional or business purposes on that territory, having taken his domicile thereon. Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of Government will not readily expel aliens. Thus, the British Government has no power to expel even the most dangerous alien without the recommendation of a Court, or without an Act of Parliament making provision for such expulsion. And in Switzerland, article 70 of the Constitution empowers the Government to expel such aliens only as endanger

Com-
petence
to expel
Aliens.

¹ 57 & 58 Vict. c. 30. Estate duty is levied in Great Britain in the case also of such alien dying abroad as leaves movable property in the United Kingdom without having

ever been resident there. As far as the Law of Nations is concerned, it is doubtful whether Great Britain is competent to claim estate duties in such cases.

the internal and external safety of the land. But many States are in no way prevented by their Municipal Law from expelling aliens according to discretion, and examples of arbitrary expulsion of aliens, who had made themselves objectionable to the respective Governments, are numerous in the past and the present.

On the other hand, it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time and has established a business there, the home State of the expelled individual is by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State and asking for the reasons for the expulsion. But as in strict law a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, although a very unfriendly, act. And there is no doubt that every expulsion of an alien without just cause is, in spite of its international legality, an unfriendly act, which can rightfully be met with retorsion.

Just
Causes of
Expulsion
of Aliens.

§ 324. On account of the fact that retorsion might be justified, the question is of importance what just causes of expulsion of aliens there are. As International Law gives no detailed rules regarding expulsion, everything is left to the discretion of the single States and depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing or temporarily staying within his territory. And, although such a measure may be very hard and cruel, the opinion is general that such expulsion is justifiable.¹ As regards expulsion in time of

¹ Thus in 1870, during the Franco-German war, the French expelled all Germans from France, and the former South African Republic

peace, on the other hand, the opinions of writers as well as of States naturally differ much. Such State as expels an alien will hardly admit not having had a just cause. Some States, as Belgium¹ since 1885, possess Municipal Laws determining just causes for the expulsion of aliens, and such States' discretion concerning expulsion is, of course, more or less restricted. But many States do not possess such laws, and are, therefore, entirely at liberty to consider a cause as justifying expulsion or not. The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty-one articles concerning the admittance and expulsion of aliens, and in article 28 thereof enumerated nine just causes for expulsion in time of peace.² I doubt whether the States will ever come to an agreement about just causes of expulsion. The fact cannot be denied that an alien is more or less a guest in the foreign land, and the question under what conditions such guest makes himself objectionable to his host cannot once for all be answered by the establishment of a body of rules. So much is certain, that with the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism guaranteeing individual liberty and freedom of opinion and speech, expulsion of aliens, especially for political reasons, will become less frequent. Expulsion will, however, never totally disappear, because it may well be justified. Thus, for example, Prussia after the annexation of the formerly Free Town of Frankfort-on-the-Main, was certainly justified in expelling those individuals who, for the purpose of avoiding military service in the Prussian Army, had by naturalisation become Swiss citizens without giving up their residence at Frankfort.

expelled in 1899, during the Boer war, almost all British subjects. See below, vol. II. § 100.

¹ See details in Rivier, I. p. 312.

² See *Annuaire*, XII. p. 223.

Many of these causes, as conviction for crimes, for instance, are certainly just causes, but others are doubtful.

Expulsion
how
effected.

§ 325. Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when compulsion is meted out to a domiciled alien. And the home State of the expelled, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence. But this is valid as regards the first expulsion only. Should the expelled refuse to leave the territory voluntarily or, after having left, return without authorisation, he may be arrested, punished, and forcibly brought to the frontier.

Reconduc-
tion in
Contradis-
tinction to
Expul-
sion.

§ 326. In many Continental States destitute aliens, foreign vagabonds, suspicious aliens without papers of legitimation, alien criminals who have served their punishment, and the like, are without any formalities arrested by the police and reconducted to the frontier. There is no doubt that the competence for such reconduction, which is often called *droit de renvoi*, is an inference from the territorial supremacy of every State, for there is no reason whatever why a State should not get rid of such undesirable aliens as speedily as possible. But although such reconduction is materially not much different from expulsion, it nevertheless differs much from this in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners.¹ The home State of such reconducted aliens has the duty to receive them, since, as will be remembered,² a State cannot refuse to receive such of its subjects as are expelled from abroad. Difficulties arise, however, sometimes

¹ Rivier, I. p. 308, correctly distinguishes between reconduction and

expulsion; but Phillimore, I. § 364, seems to confound them.

² See above, § 294.

concerning the reconduction of such alien individuals as have lost their nationality through long-continued absence¹ from home without having acquired another nationality abroad. Such cases are a further example of the fact that the very existence of stateless individuals is a blemish in Municipal as well as International Law.²

IX

EXTRADITION

Hall, §§ 13 and 63—Westlake, I. pp. 241-251—Lawrence, §§ 110-111—Phillimore, I. §§ 365-389D—Twiss, I. § 236—Halleck, I. pp. 257-268—Taylor, §§ 205-211—Walker, § 19—Wharton, II. §§ 268-282—Wheaton, §§ 115-121—Moore, IV. §§ 579-622—Bluntschli, §§ 394-401—Hartmann, § 89—Heffter, § 63—Lammasch in Holtzendorff, III. pp. 454-566—Liszt, § 33—Ullmann, §§ 127-131—Bonfils, Nos. 455-481—Despagnet, Nos. 276-286—Pradier-Fodéré, III. Nos. 1863-1893—Mérignhac, II. pp. 732-777—Rivier, I. pp. 348-357—Nys, II. pp. 244-253—Calvo, II. §§ 949-1071—Fiore, Code, Nos. 584-586—Martens, II. §§ 91-98—Spear, "The Law of Extradition" (1879)—Lammasch, "Auslieferungspflicht und Asylrecht" (1887)—Martitz, "Internationale Rechtshilfe in Strafsachen," 2 vols. (1888 and 1897)—Bernard, "Traité théorique et pratique de l'extradition," 2 vols. (2nd ed. 1890)—Moore, "Treatise on Extradition" (1891)—Hawley, "The Law of International Extradition" (1893)—Clark, "The Law of Extradition" (3rd ed. 1903)—Biron and Chalmers, "The Law and Practice of Extradition" (1903)—Piggott, "Extradition" (1910)—Lammasch in R.G. III. (1896), pp. 5-14—Diena in R.G. XII. (1905), pp. 516-544—See the French, German, and Italian literature concerning extradition quoted by Fauchille in Bonfils, No. 455.

§ 327. Extradition is the delivery of a prosecuted individual to the State on whose territory he has committed a crime by the State on whose territory the criminal is for the time staying. Although Grotius³ holds that every State has the duty either to punish or to surrender to the prosecuting State such individuals within its boundaries as have committed a crime abroad, and although there is as regards the

Extradition no legal duty.

¹ See above, § 302, No. 3.

² It ought to be mentioned that many States have, either by special treaties or in their treaties of commerce, friendship, and the like,

stipulated proper treatment of each other's destitute subjects on each other's territory.

³ II. c. 21, § 4.

majority of such cases an important interest of civilised mankind that this should be done, this rule of Grotius has never been adopted by the States and has, therefore, never become a rule of the Law of Nations. On the contrary, States have always upheld their competence to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases, of course, excepted which fall under stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which commands¹ extradition.

Extradition
Treaties
how
arisen.

§ 328. Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for the more important crimes, political crimes excepted, are actually always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. Before the eighteenth century extradition of ordinary criminals hardly ever occurred, although many States used then frequently to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like.

¹ Clarke, op. cit. pp. 1-15, tries to prove that a duty to extradite criminals does exist, but the result of all his labour is that he finds that the refusal of extradition is "a serious violation of the moral obligations which exist between civilised States"

(see p. 14). But nobody has ever denied this as far as the ordinary criminal is concerned. The question is only whether an international legal duty exists to surrender a criminal. And this legal duty States have always denied.

Vattel (II. § 76) is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But general treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and Transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then and thereby that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other. General treaties of extradition became, therefore, a necessity, and the several States succeeded in concluding such treaties with each other. There is no civilised State in existence nowadays which has not concluded such treaties with the majority of the other civilised States. And the consequence is that, although no universal rule of International Law commands it, extradition of criminals between States is an established fact based on treaties. The present condition of affairs is, however, very unsatisfactory, since there are many hundreds of treaties in existence which do not at all agree in their details. What is required nowadays, and what will certainly be realised in the near future, is a universal treaty of extradition, one single treaty to which all the civilised States become parties.¹

§ 329. Some States, however, were unwilling to de-

Municipal
Extradi-
tion Laws.

¹ The Second Pan-American Conference of 1902 produced a treaty of extradition which was signed by twelve States, namely, the United States of America, Colombia, Costa Rica, Chili, San Domingo, Ecuador,

Salvador, Guatemala, Haiti, Honduras, Mexico, and Nicaragua, but this treaty has not been ratified; see the text in "Annuaire de la Vie Internationale" (1908-9), p. 461.

pend entirely upon the discretion of their Governments as regards the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted special Municipal Laws which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws¹ furnish the basis for the conclusion of extradition treaties. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that England followed the example given by Belgium. English public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. This country possessed, therefore, before 1870 a few extradition treaties only, which moreover were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass the Extradition Act.² This Act, which was amended by another in 1873³ and a third in 1895,⁴ has furnished the basis for extradition treaties of Great Britain with forty other States.⁵ Belgium enacted a new extradition law in 1874. Holland enacted such a law in 1875, Luxemburg in the same year, Argentina in 1885, the Congo Free State in 1886, Peru in 1888, Switzerland in 1892.

Such States as possess no extradition laws and whose written Constitution does not mention the

¹ See Martitz, "Internationale Rechtshilfe," I. pp. 747-818, where the history of all these laws is sketched and their text is printed.

² 33 & 34 Vict. c. 52.

³ 36 & 37 Vict. c. 60.

⁴ 58 & 59 Vict. c. 33. On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, *op. cit.* pp. 126-166.

⁵ The full text of these treaties is printed by Clarke, as well as Biron and Chalmers. Not to be confounded with extradition of criminals to foreign States is extradition within the British Empire from one part of the British dominions to another. This matter is regulated by the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 169).

matter, leave it to their Governments to conclude extradition treaties according to their discretion. And in these countries the Governments are competent to extradite an individual even if no extradition treaty exists.

§ 330. Since extradition is the delivery of an incriminated individual to the State on whose territory he has committed a crime by the State on whose territory he is for the time staying, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third State. Many States, however, as France and most other States of the European continent, have adopted the principle never to extradite one of their subjects to a foreign State, but themselves to punish subjects of their own for grave crimes committed abroad. Other States, as Great Britain and the United States, have not adopted this principle, and do extradite such of their subjects as have committed a grave crime abroad. Thus Great Britain surrendered in 1879 to Austria, where he was convicted and hanged,¹ one Tourville, a British subject, who, after having murdered his wife in the Tyrol, had fled home to England. And it must be emphasised that the object of extradition is an individual who has committed a crime abroad, whether or not he was during the commission of the criminal act physically present on the territory of the State where the crime was committed. Thus, in 1884, Great Britain surrendered one Nillins to Germany, who, by sending from Southampton forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to

Object of
Extradition.

¹ This case is all the more remarkable, as (see 24 & 25 Vict. c. 100, § 9) the criminal law of England extends over murder and manslaughter committed abroad by English subjects, and as, according to article 3 of the

extradition treaty of 1873 between England and Austria-Hungary, the contracting parties are in no case under obligation to extradite their own subjects.

have committed forgery and to have obtained goods by false pretences in Germany.¹

A conflict between International and Municipal Law arises if a certain individual must be extradited according to an extradition treaty, but cannot be extradited according to the Municipal Law of the State from which extradition is demanded. Thus in the case of Salvatore Paladini,² whose extradition was demanded by the United States of America from the Italian Government in 1888 for having passed counterfeit money, Italian Municipal Law, which prohibits the extradition of an Italian citizen, came into conflict with article 1 of the Extradition Treaty of 1868 between Italy and the United States which stipulates extradition of criminals without exempting nationals. For this reason Italy refused to extradite Paladini. It is noteworthy that the United States, although they do not any longer press for extradition of Italian subjects who, after having committed a crime in the United States have returned to Italy, nevertheless consider themselves bound by the above-mentioned treaty of 1868 to extradite to Italy such American subjects as have committed a crime in Italy. Therefore, when in 1910 the Italian Government demanded from the United States extradition of one Porter Charlton,³ an American citizen, for having committed a murder in Italy, extradition was granted.

Extra-
ditable
Crimes.

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith and specify in those treaties all those crimes for which they are willing to grant extradition. And no person is to be extra-

¹ See Clarke, *op. cit.* pp. 177 and 262, who, however, disapproves of this surrender.

² See Moore, IV. § 594, pp. 290-297.

³ See A.J. V. (1911), pp. 182-191.

dited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition. As regards Great Britain, the following are extraditable crimes according to the Extradition Act of 1870:— Murder and manslaughter; counterfeiting and uttering counterfeit money; forgery and uttering what is forged; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy laws; fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer of any company; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy by the Law of Nations; sinking or destroying a vessel at sea; assaults on board ship on the High Seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy against the authority of the master on board a ship on the High Seas. The Extradition Acts of 1873 and 1906 added the following crimes to the list:—Kidnapping, false imprisonment, perjury, subornation of perjury, and bribery.

Political criminals are, as a rule, not extradited,¹ and according to many extradition treaties military deserters and such persons as have committed offences against religion are likewise excluded from extradition.

§ 332. Extradition is granted only if asked for, and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. It is effected through handing over the criminal by the police of the extraditing State to the police of the prosecuting State. But it must be emphasised that, according to most extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes exclusively for which his

Effectua-
tion and
Condition
of Extra-
dition.

¹ See below, §§ 333–340.

extradition has been asked and granted, or for those at least which the extradition treaty concerned enumerates.¹ If, nevertheless, an extradited individual is tried and punished for another crime, the extraditing State has a right of intervention.²

An important question is whether, in case a criminal, who has succeeded in escaping into the territory of another State, is erroneously handed over, without the formalities of extradition having been complied with, by the police of the local State to the police of the prosecuting State, such local State can demand that the prosecuting State shall send the criminal back and ask for his formal extradition. This question was decided in the negative in February 1911 by the Court of Arbitration at the Hague in the case of *France v. Great Britain concerning Savarkar*. This British-Indian subject, who was prosecuted for high treason and abatement of murder, and was being transported in the P. and O. boat *Morea* to India for the purpose of standing his trial there, escaped to the shore on October 25, 1910, while the vessel was in the harbour of Marseilles. He was, however, seized by a French policeman, who, erroneously and without further formalities, reconducted him to the *Morea* with the assistance of individuals from the vessel who had raised a hue-and-cry. Since Savarkar was *prima facie* a political criminal, France demanded that England should give him up and should request his extradition in a formal way, but England refused to comply with this demand, and the parties, therefore, agreed to have the conflict decided by the Court of Arbitration at the Hague. The award, while admitting that an irregularity had been committed by

¹ See Mettgenberg in the "Zeitschrift für internationales Recht," XVIII. (1908), pp. 425-430.

² It ought to be mentioned that the Institute of International Law in

1880, at its meeting in Oxford (see *Annuaire*, V. p. 117), adopted a body of twenty-six rules concerning extradition.

the reconduction of Savarkar to the British vessel, decided, correctly, I believe, in favour of Great Britain, asserting that there was no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him on account of a mistake committed by the foreign agent who delivered him up to that Power.¹ It should be mentioned that the French Government had been previously informed of the fact that Savarkar would be a prisoner on board the *Morea* while she was calling at Marseilles, and had agreed to this.

X

PRINCIPLE OF NON-EXTRADITION OF POLITICAL CRIMINALS

Westlake, I. pp. 247-248—Lawrence, § 111—Taylor, § 212—Wharton, II. § 272—Moore, IV. § 604—Bluntschli, § 396—Hartmann, § 89—Lammasch in Holtzendorff, III. pp. 485-510—Liszt, § 33—Ullmann, § 129—Rivier, I. pp. 351-357—Nys, II. pp. 253-256—Calvo, II. §§ 1034-1036—Martens, II. § 96—Bonfils, Nos. 466-467—Pradier-Fodéré, III. Nos. 1871-1873—Mérignhac, II. pp. 754-771—Soldan, "L'extradition des criminels politiques" (1882)—Martitz, "Internationale Rechtshilfe in Strafsachen," vol. II. (1897), pp. 134-707—Lammasch, "Auslieferungspflicht und Asylrecht" (1887), pp. 203-355—Grivaz, "Nature et effets du principe de l'asyle politique" (1895)—Piggott, "Extradition" (1910), pp. 42-60—Scott in A.J. III. (1909), pp. 459-461.

§ 333. Before the French Revolution² the term "political crime" was unknown in either the theory or the practice of the Law of Nations. And the principle of non-extradition of political criminals was likewise non-existent. On the contrary, whereas extradi-

How
Non-ex-
tradition
of Political
Criminals
became
the Rule.

¹ See Hamelin, "L'Affaire Savarkar" (Extrait du "Recueil général de Jurisprudence, de Doctrine et de Législation coloniales," 1911), who defends the French view. The award of the Court of Arbitration has been severely criticised by Baty in the *Law Magazine and Review*, XXXVI. (1911), pp. 326-330; Kohler

in Z.V. V. (1911), pp. 202-211; Strupp, "Zwei praktische Fälle aus dem Völkerrecht" (1911), pp. 12-26; Robin in R.G. XVIII. (1911), pp. 303-352; Hamel in R.I. 2nd Ser. XIII. (1911), pp. 370-403.

² I follow in this section for the most part the summary of the facts given by Martitz, op. cit. II. pp. 134-184.

tion of ordinary criminals was, before the eighteenth century at least, hardly ever stipulated, treaties very often stipulated the extradition of individuals who had committed such deeds as are nowadays termed "political crimes," and such individuals were frequently extradited even when no treaty stipulated it.¹ And writers in the sixteenth and seventeenth centuries did not at all object to such practice on the part of the States; on the contrary, they frequently approved of it.² It is indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against despotism and absolutism throughout the western part of the European continent. It was then that the term "political crime" arose, and article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country "for the cause of liberty." On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of political criminals even then did not conquer the world. Until 1830 political criminals frequently were extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. And in 1816 Lord Castlereagh declared that there could be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who had committed political

¹ Martitz, *op. cit.* II. p. 177, gives a list of important extraditions of

political criminals which took place between 1648 and 1789.

² So Grotius, II. c. 21, § 5, No. 5.

crimes only. The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary Continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. And although, in 1823, Switzerland was forced by threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way. The question as to that asylum was discussed with much passion in the press of Europe. And although the principle of non-extradition was far from becoming universally recognised, that discussion indirectly fostered its growth. A practical proof thereof is that in 1830 even Austria and Prussia, two of the reactionary Powers of that time, refused Russia's demand for extradition of fugitives who had taken part in the Polish Revolution of that year. And another proof thereof is that at about the same time, in 1829, a celebrated dissertation¹ by a Dutch jurist made its appearance, in which the principle of non-extradition of political criminals was for the first time defended with juristic arguments and on a juristic basis.

On the other hand, a reaction set in in 1833, when Austria, Prussia, and Russia concluded treaties which remained in force for a generation, and which stipulated that henceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted

¹ H. Provó Kluit, "De deditione profugorum."

her celebrated extradition law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt the duty of making it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put into practice in the treaty of extradition concluded in 1834 between Belgium and France. The latter, which to the present day has no municipal extradition law, has nevertheless henceforth always in her extradition treaties with other Powers stipulated the principle of non-extradition of political criminals. And the other Powers followed gradually. Even Russia had to give way, and since 1867 this principle is to be found in all extradition treaties of Russia with other Powers, that with Spain of 1888 excepted. It is due to the stern attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world. These countries, in which individual liberty is the very basis of all political life, and constitutional government a political dogma of the nation, watched with abhorrence the methods of government of many other States between 1815 and 1860. These Governments were more or less absolute and despotic, repressing by force every endeavour of their subjects to obtain individual liberty and a share in the government. Thousands of the most worthy citizens and truest patriots had to leave their country for fear of severe punishment for political crimes. Great Britain and the other free countries felt in honour bound not to surrender such exiled patriots to the persecution of their Governments, but to grant them an asylum.

Difficulty
concern-

§ 334. Although the principle became and is

generally¹ recognised that political criminals shall not be extradited, serious difficulties exist concerning the conception of "political crime." Such conception is of great importance, as the extradition of a criminal may depend upon it. It is unnecessary here to discuss the numerous details of the controversy. It suffices to state that whereas many writers call such crime "political" as was committed from a political motive, others call "political" any crime committed for a political purpose; again, others recognise such crime only as "political" as was committed from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term "political crime" to certain offences against the State only, as high treason, *lèse-majesté*, and the like.² To the present day all attempts have failed to formulate a satisfactory conception of the term, and the reason of the thing will, I believe, for ever exclude the possibility of finding a satisfactory conception and definition.³ The difficulty is caused through the so-called "relative political crimes" or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time⁴ an ordinary crime, such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable

ing the
Concep-
tion of
Political
Crime.

¹ See, however, below, § 340, concerning the reactionary movement in the matter.

² See Mettgenberg, "Die Attentatsklausel im deutschen Auslieferungsrecht" (1906), pp. 61–76, where a survey of the different opinions is given.

³ According to Stephen, "History of the Criminal Law in England," vol. II. p. 71, political crimes are such as are identical to and form a part of political disturbances.

⁴ The problem came twice before the English courts; see *Ex parte Castione*, L.R. [1891] 1 Q.B. 149, and

In re Meunier, L.R. [1894] 2 Q.B. 415. In the case of Castione, a Swiss who had taken part in a revolutionary movement in the canton of Ticino and had incidentally shot a member of the Government, the Court refused extradition because the crime was considered to be political. On the other hand, in the case of Meunier, a French anarchist who was prosecuted for having caused two explosions in France, one of which resulted in the death of two individuals, the extradition was granted because the crime was not considered to be political.

political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have roused the indignation of the whole civilised world, and have indeed endangered the very value of the principle of non-extradition of political criminals. Three practical attempts have therefore been made to deal with such complex crimes without violating this principle.

The
so-called
Belgian
Attentat
Clause.

§ 335. The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856,¹ following the case of Jacquin in 1854. A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on account of the Belgian extradition law interdicting the surrender of political criminals. To provide for such cases in the future, Belgium enacted in 1856 a law amending her extradition law and stipulating that murder of the head of a foreign Government or of a member of his family should not be considered a political crime. Gradually all European States, with the exception of England and Switzerland, have adopted that *attentat* clause, and a great many Continental writers urge its adoption by the whole of the civilised world.²

The
Russian
Project of
1881.

§ 336. Another attempt to deal with complex crimes without detriment to the principle of non-extradition of political criminals was made by Russia in 1881. Influenced by the murder of the Emperor Alexander

¹ See details in Martitz, op. cit. II. p. 372.

² See Mettgenberg, op. cit. pp. 109-114.

II. in that year, Russia invited the Powers to hold an International Conference at Brussels for the consideration of the proposal that thenceforth no murder or attempt to murder ought to be considered as a political crime. But the Conference did not take place, since Great Britain as well as France declined to take part in it.¹ Thus the development of things had come to a standstill, many States having adopted, others declining to adopt, the Belgian clause, and the Russian proposal having fallen through.

§ 337. Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis. In that year Switzerland enacted an extradition law whose article 10 recognises the non-extradition of political criminals, but at the same time lays down the rule that political criminals shall nevertheless be surrendered in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the "Bundesgericht," the highest Swiss Court of Justice. This Swiss rule contains a better solution of the problem than the Belgian *attentat* clause in so far as it allows the circumstances of the special case to be taken into consideration. And the fact that the decision is taken out of the hands of the Government and transferred to the highest Court of the country, denotes likewise a remarkable progress.² For the Government cannot now be blamed whether extradition is granted or refused, the decision of an independent Court of Justice being a certain guarantee that an impartial view of the circumstances of the case has been taken.³

The Swiss
Solution of
the Pro-
blem in
1892.

¹ See details in Martitz, op. cit. II. p. 479.

² See Langhard, "Das Schweizerische Auslieferungsrecht" (1910), where all the cases are discussed which have come before the Court since 1892.

³ It ought to be mentioned that

the Institute of International Law at its meeting at Geneva in 1892 (see *Annuaire*, XII. p. 182) adopted four rules concerning extradition of political criminals, but I do not think that on the whole these rules give much satisfaction.

Rationale
for the
Principle
of Non-ex-
tradition
of Political
Criminals.

§ 338. The numerous attempts¹ against the lives of heads of States and the frequency of anarchistic crimes have shaken the value of the principle of non-extradition of political criminals in the opinion of the civilised world as illustrated by the three practical attempts described above to meet certain difficulties. It is, consequently, no wonder that some writers² plead openly and directly for the abolition of this principle, maintaining that it was only the product of abnormal times and circumstances such as were in existence during the first half of the nineteenth century, and that with their disappearance the principle is likely to do more harm than good. And indeed it cannot be denied that the application of the principle in favour of some criminals, such as anarchistic³ murderers and bomb-throwers, could only be called an abuse. But the question is whether, apart from such exceptional cases, the principle itself is still to be considered as justified or not.

¹ Not less than nineteen of these attempts have been successful since 1850, as the following formidable list shows:—

Charles II., Duke of Parma,	murdered on March 26, 1854.
Prince Danilo of Montenegro,	„ August 14, 1860.
President Abraham Lincoln, U.S.A.,	„ April 14, 1865.
Prince Michael of Servia,	„ June 10, 1868.
President Balta of Peru,	„ July, 1872.
President Moreno of Ecuador,	„ August 6, 1872.
Sultan Abdul Assis of Turkey,	„ June 4, 1876.
Emperor Alexander II. of Russia,	„ March 13, 1881.
President Garfield, U.S.A.,	„ July 2, 1881.
President Carnot of France,	„ June 24, 1894.
Shah Nazr-e-Din of Persia,	„ May 1, 1896.
Empress Elizabeth of Austria,	„ September 10, 1898.
King Humbert I. of Italy,	„ July 30, 1900.
President McKinley, U.S.A.,	„ September 6, 1901.
King Alexander I. of Servia and Queen Draga,	„ June 10, 1903.
King Carlos I. of Portugal and the Crown Prince,	„ February 15, 1908.
President Caceres of San Domingo,	„ November 19, 1911.

² See, for instance, Rivier, I. p. 354, and Scott in A.J. III. (1909), p. 459.

³ “. . . the party with whom the accused is identified . . . namely the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against the general body of citizens. They may,

secondarily and incidentally, commit offences against some particular government, but anarchist offences are mainly directed against private citizens.” (From the judgment of Cave, J. *In re Meunier*, L.R. [1894] 2 Q.B. 419.)—See also Diena in R.G. II. (1905), pp. 306–336.

Without doubt the answer must be in the affirmative. I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the respective Governments. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways to bring grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation, and their gradual realisation over the whole globe is conducive to the welfare of the human race.

Political crimes may certainly be committed in the interest of reaction as well as in the interest of progress, and reactionary political criminals may have occasion to ask for asylum as well as progressive political criminals. The principle of non-extradition of political criminals indeed extends its protection over the former too, and this is the very point where the value of the principle reveals itself. For no State has a right to interfere with the internal affairs of another State, and, if a State were to surrender reactionary political criminals but not progressive ones, the prosecuting State of the latter could indeed complain and consider the refusal of extradition an unfriendly act. If, however, non-extradition is made a general principle which finds its application in favour of political criminals of every kind, no State can complain if extradition is refused. Have not reactionary States the same faculty of refusing the extradition of reactionary political criminals as

free States have of refusing the extradition of progressive political criminals ?

Now, many writers agree upon this point, but maintain that such arguments meet the so-called purely political crimes only, and not the relative or complex political crimes, and they contend, therefore, that the principle of non-extradition ought to be restricted to the former crimes only. But to this I cannot assent. No revolt happens without such complex crimes taking place, and the individuals who commit them may indeed deserve the same protection as other political criminals. And, further, although I can under no circumstances approve of murder, can never sympathise with a murderer, and can never pardon his crime, it may well be the case that the murdered official or head of a State has by inhuman cruelty and oppression himself whetted the knife which cut short his span of life. On the other hand, the mere fact that a crime was committed for a political purpose may well be without any importance in comparison with its detestability and heinousness. Attempts on heads of States, such, for example, as the murders of Presidents Lincoln and Carnot or of Alexander II. of Russia and Humbert of Italy, are as a rule, and all anarchistic crimes are without any exception, crimes of that kind. Criminals who commit such crimes ought under no circumstances to find protection and asylum, but ought to be surrendered for the purpose of receiving their just and appropriate punishment.

How to
avoid Mis-
applica-
tion of the
Principle
of Non-ex-
tradition
of Political
Criminals.

§ 339. The question, however, is how to sift the chaff from the wheat, how to distinguish between such political criminals as deserve an asylum and such as do not. The difficulties are great and partly insuperable as long as we do not succeed in finding a satisfactory conception of the term "political crime." But such difficulties are only partly, not wholly, insuperable. The step taken by the Swiss extradition law of 1892 is

so far in advance as to meet a great many of the difficulties. There is no doubt that the adoption of the Swiss rule by all the other civilised States would improve matters more than the universal adoption of the so-called Belgian *attentat* clause. The fact that according to Swiss law each case of complex political crime is unravelled and obtains the verdict of an independent Court according to the very circumstances, conditions, and requirements under which it occurred, is of the greatest value. It enables every case to be met in such a way as it deserves, without compromising the Government, and without sacrificing the principle of non-extradition of political criminals as a valuable rule. I cannot support the charge made by some writers¹ that the Swiss law is inadequate because it does not give criteria for the guidance of the Court in deciding whether or no extradition for complex crimes should be granted. In my opinion, the very absence of such criteria proves the superiority of the Swiss clause to the Belgian *attentat* clause. On the one hand, the latter is quite insufficient, for it restricts its stipulations to murder of heads of States and members of their families only. But I see no reason why individuals guilty of any murder—as provided by the Russian proposal—or who have committed other crimes, such as arson, theft, and the like, should not be surrendered in case the political motive or purpose of the crime is of no importance in comparison with the crime itself. On the other hand, the Belgian clause goes too far, since exceptional cases of murder of heads of States from political motives or for political purposes might occur which do not deserve extradition. The Swiss clause, however, with its absence of fixed distinctions between such complex crimes as are extraditable, and such as are not, permits the consideration of the circumstances, conditions, and

¹ See, for instance, Martitz, *op. cit.* II. pp. 533–539.

requirements under which a complex crime was committed. It is true that the responsibility of the Court of Justice which has to decide whether such a complex crime is extraditable is great. But it is to be taken for granted that such Court will give its decision with impartiality, fairness, and justice. And it need not be feared that such Court will grant asylum to a murderer, incendiary, and the like, unless convinced that the deed was really political.

Reaction-
ary Extra-
dition
Treaties.

§ 340. Be that as it may, the present condition of matters is a danger to the very principle of non-extradition of political criminals. Under the influence of the excitement caused by numerous criminal attempts in the last quarter of the nineteenth century, a few treaties have already been concluded which make a wide breach in this principle. It is Russia which is leading the reaction. This Power in 1885 concluded treaties with Prussia and Bavaria which stipulate the extradition of all individuals who have made an attack on the life, the body, or the honour¹ of a monarch, or of a member of his family, or who have committed any kind of murder or attempt to murder. And the extradition treaty between Russia and Spain of 1888 goes even further and abandons the principle of non-extradition of political criminals altogether. Fortunately, the endeavour of Russia to abolish this principle altogether has not succeeded. In her extradition treaty with Great Britain of 1886 she had to adopt it without any restriction, and in her extradition treaties with Portugal of 1887, with Luxemburg of 1892, and with the United States and Holland of 1893, she had to adopt it with a restrictive clause similar to the Belgian *attentat* clause.

¹ Thus, even for *lèse majesté* extradition must be granted.

PART III

ORGANS OF THE STATES FOR THEIR INTERNATIONAL RELATIONS

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

POSITION OF HEADS OF STATES ACCORDING TO INTERNATIONAL LAW

Hall, § 97—Phillimore, II. §§ 101 and 102—Bluntschli, §§ 115–125—Holtzendorff in Holtzendorff, II. pp. 77–81—Ullmann, § 40—Rivier, I. § 32—Nys, II. pp. 325–329—Fiore, II. No. 1097—Bonfilis, No. 632—Mérignbac, II. pp. 294–305—Bynkershoek, “De foro legatorum” (1721), c. III. § 13.

§ 341. As a State is an abstraction from the fact that a multitude of individuals live in a country under a Sovereign Government, every State must have a head as its highest organ, which represents it within and without its borders in the totality of its relations. Such head is the monarch in a monarchy and a president or a body of individuals, as the Bundesrath of Switzerland, in a republic. The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution it likes and of changing such Constitution according to its discretion. Some kind or other of a head of the State is, however, necessary according to International Law, as without a head there is no State in existence, but anarchy.

Necessity
of a Head
for every
State.

§ 342. In case of the accession of a new head of a State, other States are as a rule notified. The latter usually recognise the new head through some formal act, such as a congratulation. But neither such notification nor recognition is strictly necessary ac-

Recogni-
tion of
Heads of
States.

according to International Law, as an individual becomes head of a State, not through the recognition of other States, but through Municipal Law. Such notification and recognition are, however, of legal importance. For through notification a State declares that the individual concerned is its highest organ, and has by Municipal Law the power to represent the State in the totality of its international relations: And through recognition the other States declare that they are ready to negotiate with such individual as the highest organ of his State. But recognition of a new head by other States is in every respect a matter of discretion. Neither has a State the right to demand from other States recognition of its new head, nor has any State a right to refuse such recognition. Thus Russia, Austria, and Prussia refused until 1848 recognition to Isabella, Queen of Spain, who had come to the throne as an infant in 1833. But, practically, in the long run recognition cannot be withheld, for without it international intercourse is impossible, and States with self-respect will exercise retorsion if recognition is refused to the heads they have chosen. Thus, when, after the unification of Italy in 1861, Mecklenburg and Bavaria refused the recognition of Victor Emanuel as King of Italy, Count Cavour revoked the *exequatur* of the consuls of these States in Italy.

But it must be emphasised that recognition of a new head of a State by no means implies the recognition of such head as the legitimate head of the State in question. Recognition is in fact nothing else than the declaration of other States that they are ready to deal with a certain individual as the highest organ of the particular State, and the question remains totally undecided whether such individual is or is not to be considered the legitimate head of that State.

representative in the totality of its international relations, acts for his State in the latter's international intercourse, with the consequence that all his legally relevant international acts are considered acts of his State. His competence to perform such acts is termed *jus repræsentationis omnimodæ*. It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question of the special case, how far this competence is independent of Municipal Law. For heads of States exercise this competence for their States and as the latter's representatives, and not in their own right. If a head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such treaty would not be binding upon his State.¹

Heads of
States.

On the other hand, this competence is certainly independent of the question whether a head of a State is the legitimate head or a usurper. The mere fact that an individual is for the time being the head of a State makes him competent to act as such head, and his State is legally bound by his acts. It may, however, be difficult to decide whether a certain individual is or is not the head of a State, for after a revolution some time always elapses before matters are settled.

§ 344. Heads of States are never subjects² of the Law of Nations. The position a head of a State has according to International Law is due to him, not as an individual, but as the head of his State. His position is derived from international rights and duties of his State, and not from international rights of his own. Consequently, all rights possessed by heads of States

Heads of
States
Objects of
the Law of
Nations.

¹ See below, § 497.

² But Heffter (§ 48) maintains the contrary, and Phillimore (II. § 100) designates monarchs *mediately and*

derivatively as subjects of International Law. The matter is treated in detail above, §§ 13 and 288-290; see also below, § 384.

abroad are not international rights, but rights which must be granted to them by the Municipal Law of the foreign State on whose territory such foreign heads of States are temporarily staying, and such rights must be granted in compliance with international rights of the home States of the respective heads. Thus, heads of States are not subjects but objects of International Law, and in this regard are like any other individual.

Honours
and Privi-
leges of
Heads of
States.

§ 345. All honours and privileges of heads of States due to them by foreign States are derived from the fact that dignity is a recognised quality of States as members of the Family of Nations and International Persons.¹ Concerning such honours and privileges, International Law distinguishes between monarchs and heads of republics. This distinction is the necessary outcome of the fact that the position of monarchs according to the Municipal Law of monarchies is totally different from the position of heads of republics according to the Municipal Law of the republics. For monarchs are sovereigns, but heads of republics are not.

II

MONARCHS

Vattel, I. §§ 28-45; IV. § 108—Hall, § 49—Lawrence, § 105—Phillimore, II. §§ 108-113—Taylor, § 129—Moore, II. § 250—Bluntschli, §§ 126-153—Heffter, §§ 48-57—Ullmann, §§ 41-42—Rivier, I. § 33—Nys, II. pp. 280-296—Calvo, III. §§ 1454-1479—Fiore, II. Nos. 1098-1102—Bonfils, Nos. 633-647—Mérignhac, II. pp. 94-105—Pradier-Fodéré, III. Nos. 1564-1591.

Sove-
reignty of
Monarchs.

§ 346. In every monarchy the monarch appears as the representative of the sovereignty of the State and thereby becomes a Sovereign himself, a fact which is recognised by International Law. And the difference between the Municipal Laws of the different States

¹ See above, § 121.

regarding this point matters in no way. Consequently, International Law recognises all monarchs as equally sovereign, although the difference between the constitutional positions of monarchs is enormous, if looked upon in the light of the rules laid down by the Constitutional Laws of the different States. Thus, the Emperor of Russia, whose powers are very wide, and the King of England, who is sovereign in Parliament only, and whose powers are therefore very much restricted, are indifferently sovereign according to International Law.

§ 347. Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State. Foreign States have to give him his usual and recognised predicates¹ in all official communications. Every monarch must be treated as a peer of other monarchs, whatever difference in title and actual power there may be between them.

Consi-
deration
due to
Monarchs
at home.

§ 348. As regards, however, the consideration due to a monarch abroad from the State on whose territory he is staying in time of peace and with the consent and the knowledge of the Government, details must necessarily be given. The consideration due to him consists in honours, inviolability, and extritoriality.

Consi-
deration
due to
Monarchs
abroad.

(1) In consequence of his character of Sovereign, his home State has the right to demand that certain ceremonial honours be rendered to him, the members of his family, and the members of his retinue. He must be addressed by his usual predicates. Military salutes must be paid to him, and the like.

(2) As his person is sacrosanct, his home State has a right to insist that he be afforded special protection as regards personal safety, the maintenance of personal dignity, and the unrestrained intercourse with his Government at home. Every offence against him must

¹ Details as regards the predicates of monarchs are given above, § 119.

be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The wife of a Sovereign must be afforded the same protection and exemption.

(3) He must be granted so-called extraterritoriality conformably with the principle: "Par in parem non habet imperium," according to which one Sovereign cannot have any power over another Sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff.¹ The house where he has taken his residence must enjoy the same extraterritoriality as the official residence of an ambassador; no policeman or other official must be allowed to enter it without his permission. Even if a criminal takes refuge in such residence, the police must be prevented from entering it, although, if the criminal's surrender is deliberately refused, the Government may request the recalcitrant Sovereign to leave the country and then arrest the criminal. If a foreign Sovereign has real property in a country, such property is under the latter's jurisdiction. But as soon as such Sovereign takes his residence on the property, it must become extraterritorial for the time being. Further, a Sovereign staying in a foreign country must be allowed to perform all his own governmental acts and functions, except when his country is at war with a third State and the State in which he is staying remains neutral. And, lastly, a Sovereign must be allowed, within the same limits as at home, to exercise civil jurisdiction over the members of his retinue. In former times even criminal jurisdiction over the members of his suite was very often claimed and conceded, but this is now anti-

¹ See above, § 115, and the cases there quoted; see also Phillimore, II. § 113A, and Loening, "Die Gerichts-

barkeit über fremde Staaten und Souveräne" (1903).

quoted.¹ The wife of a Sovereign must likewise be granted extritoriality, but not other members of a Sovereign's family.²

However, extritoriality is in the case of a foreign Sovereign, as in any other case, a fiction only, which is kept up for certain purposes within certain limits. Should a Sovereign during his stay within a foreign State abuse his privileges, such State is not obliged to bear such abuse tacitly and quietly, but can request him to leave the country. And when a foreign Sovereign commits acts of violence or such acts as endanger the internal or external safety of the State, the latter can put him under restraint to prevent further acts of the same kind, but must at the same time bring him as speedily as possible to the frontier.

§ 349. The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute. Several publicists maintain that the home State can claim the privilege of extritoriality as well for members of his suite as for the Sovereign himself, but others deny this.³ I believe that the opinion of the former is correct, since I cannot see any reason why a Sovereign abroad should as regards the members of his suite be in an inferior position to a diplomatic envoy.⁴

The
Retinue of
Monarchs
abroad.

§ 350. Hitherto only the case where a monarch is staying in a foreign country with the official knowledge of the latter's Government has been discussed. Such knowledge may be held in the case of a monarch travelling *incognito*, and he enjoys then the same privileges as if travelling not *incognito*. The only difference is that

Monarchs
travelling
incognito.

¹ A celebrated case happened on November 10, 1656, in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her grand equerry, Monaldeschi, to death, and had him executed by her bodyguard.

² See Rivier, I. p. 421, and

Bluntschli, § 154; but, according to Bluntschli, extritoriality need not in strict law be granted even to the wife of a Sovereign.

³ See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, I. § 83.

⁴ See below, §§ 401–405.

many ceremonial observances, which are due to a monarch, are not rendered to him when travelling *incognito*. But the case may happen that a monarch is travelling in a foreign country *incognito* without the latter's Government having the slightest knowledge thereof. Such monarch cannot then of course be treated otherwise than as any other foreign individual; but he can at any time make known his real character and assume the privileges due to him. Thus the late King William of Holland, when travelling *incognito* in Switzerland in 1873, was condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito*.

Deposed
and Abdi-
cated
Monarchs.

§ 351. All privileges mentioned must be granted to a monarch only as long as he is really the head of a State. As soon as he is deposed or has abdicated, he is no longer a Sovereign. Therefore in 1870 and 1872 the French Courts permitted, because she was deposed, a civil action against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a State from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign Sovereign, but the Law of Nations does not exact any such courtesy.

Regents.

§ 352. All privileges due to a monarch are also due to a Regent, at home or abroad, whilst he governs on behalf of an infant, or of a King who is through illness incapable of exercising his powers. And it matters not whether such Regent is a member of the King's family and a Prince of royal blood or not.

Monarchs
in the
service or
subjects
of Foreign
Powers.

§ 353. When a monarch accepts any office in a foreign State, when, for instance, he serves in a foreign army, as the monarchs of the small German States have formerly frequently done, he submits to such State as far as the duties of the office are concerned, and his home

State cannot claim any privileges for him that otherwise would be due to him.

When a monarch is at the same time a subject of another State, distinction must be made between his acts as a Sovereign, on the one hand, and his acts as a subject, on the other. For the latter, the State whose subject he is has jurisdiction over him, but not for the former. Thus, in 1837, the Duke of Cumberland became King of Hanover, but at the same time he was by hereditary title an English Peer and therefore an English subject. And in 1844, in the case *Duke of Brunswick v. King of Hanover*,¹ the Master of the Rolls held that the King of Hanover was liable to be sued in the Courts of England in respect of any acts done by him as an English subject.

III

PRESIDENTS OF REPUBLICS

Bluntschli, § 134—Stoerk in Holtzendorff, II. p. 661—Ullmann, § 42—Rivier, I. § 33—Martens, I. § 80—Walther, "Das Staatshaupt in den Republiken" (1907), pp. 190–204.

§ 354. In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and accordingly the people styles itself the Sovereign of the State. And it will be remembered that the head of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland. But in case the head is a President, as in France and the United States of America, such President represents the State, at least in the totality of its international relations. He is, however, not a Sovereign, but a citizen and subject of the very State whose head he is as President.

Presidents
not Sove-
reigns.

¹ 6 Beavan, 1; 2 House of Lords Cases, 1; see also Phillimore, II. § 109.

Position
of Presi-
dents in
general.

§ 355. Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch. Neither at home nor abroad, therefore, does a president of a republic appear as a peer of monarchs. Whereas all monarchs are in the style of the Court phraseology considered as though they were members of the same family, and therefore address each other in letters as "my brother," a president of a republic is usually addressed in letters from monarchs as "my friend." His home State can certainly at home and abroad claim such honours for him as are due to its dignity, but no such honours as must be granted to a Sovereign monarch.

Position
of Presi-
dents
abroad.

§ 356. As to the position of a president when abroad, writers on the Law of Nations do not agree. Some¹ maintain that, since a president is not a Sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of extritoriality. Others² make a distinction whether a president is staying abroad in his official capacity as head of a State or for his private purposes, and they maintain that his home State could only in the first case claim extritoriality for him. Others³ again will not admit any difference in the position of a president abroad from that of a monarch abroad. How the States themselves think as regards the question of the extritoriality of presidents of republics abroad cannot be ascertained, since to my knowledge no case has hitherto occurred in practice from which a conclusion may be drawn. But practice seems to have settled the question of ceremonial honours due to a president officially

¹ Ullmann, § 42 ; Rivier, I. p. 423 ; Stoerk in Holtzendorff, II. p. 658.

² Martens, I. § 80 ; Bluntschli, § 134 ; Despagnet, No. 254 ; Hall, § 97.

³ Bonfilis, No. 632 ; Nys, II. p. 287 ; Mérignhac, II. p. 298 ; Liszt, § 13 ; Walther, op. cit., p. 195.

abroad ; they are such as correspond to the rank of his home State, and not such as are due to a monarch. As regards exterritoriality, I believe that future contingencies will create the practice on the part of the States of granting this privilege to presidents and members of their suite as in the case of monarchs. I cannot see that there is any danger in such a grant. And nobody can deny that, if exterritoriality is not granted, all kinds of friction and even conflicts might arise. Although not Sovereigns, presidents of republics fill for the time being a sublime office, and the grant of exterritoriality to them is a tribute paid to the dignity of the States they represent.

IV

FOREIGN OFFICES

Heffter, § 201—Geffcken in Holtzendorff, III. p. 668—Ullmann, § 43—Rivier, I. § 34—Bonfils, Nos. 648–651—Nys, II. pp. 330–334.

§ 357. As a rule nowadays no head of a State, be he a monarch or a president, negotiates directly and in person with a foreign Power, although this happens occasionally. The necessary negotiations are regularly conducted by the Foreign Office, an office which since the Westphalian Peace has been in existence in every civilised State. The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet Minister, directs the foreign affairs of the State in the name of the head and with the latter's consent ; he is the middleman between the head of the State and other States. And although many a head of a State directs in fact all the foreign affairs himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass. Now, as regards the position of such Foreign Secretary at home, it is the Muni-

Position
of the
Secretary
for
Foreign
Affairs.

cipal Law of a State which regulates this. International Law defines his position regarding international intercourse with other States. He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in matters international. It is he who, either in person or through the envoys of his State, approaches foreign States for the purpose of negotiating matters international. And again it is he whom foreign States through their Foreign Secretaries or their envoys approach for the like purpose. He is present when Ministers hand in their credentials to the head of the State. All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs. It is, therefore, usual to notify the appointment of a new Foreign Secretary of a State to such foreign States as are represented within its boundaries by diplomatic envoys; the new Foreign Secretary himself makes this notification.

CHAPTER II

DIPLOMATIC ENVOYS

I

THE INSTITUTION OF LEGATION

Phillimore, II. §§ 143–153—Taylor, § 274—Twiss, § 199—Geffcken in Holtzendorff, III. pp. 605–618—Nys, II. pp. 335–339—Rivier, I. § 35—Ullmann, § 44—Martens, II. § 6—Gentilis, “De legationibus libri III.” (1585)—Wicquefort, “L’Ambassadeur et ses fonctions” (1680)—Bynkershoek, “De foro legatorum” (1721)—Garden, “Traité complet de diplomatie” (3 vols. 1833)—Mirus, “Das europäische Gesandtschaftsrecht” (2 vols. 1847)—Charles de Martens, “Le guide diplomatique” (2 vols. 1832 ; 6th ed. by Geffcken, 1866)—Montague Bernard, “Four Lectures on Subjects connected with Diplomacy” (1868), pp. 111–162 (3rd Lecture)—Alt, “Handbuch des Europäischen Gesandtschaftsrechts” (1870)—Pradier-Fodéré, “Cours de droit diplomatique” (2 vols. 2nd ed. 1899)—Krauske, “Die Entwicklung der ständigen Diplomatie,” &c. (1885)—Lehr, “Manuel théorique et pratique des agents diplomatiques” (1888)—Hill, “History of Diplomacy in the International Development of Europe,” vol. I. (1905), vol. II. (1906 ; the other vols. have not yet appeared).

§ 358. Legation as an institution for the purpose of negotiating between different States is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors enjoyed everywhere a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct. Yet permanent legations were unknown till very late in the Middle Ages. The fact that the Popes had permanent representatives—so-called *apocrisarii* or *responsales*—at the Court of the Frankish Kings and at Constantinople until the final separation of the Eastern from the

Develop-
ment of
Legations.

Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only. It was not until the thirteenth century that the first permanent legations made their appearance. The Italian Republics, and Venice in especial, created the example¹ by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs. And in the fifteenth century these Republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example. Special treaties were often concluded stipulating permanent legations, such as in 1520, for instance, between the King of England and the Emperor of Germany. From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's Courts. But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV. and Richelieu. It ought to be specially mentioned that Grotius² thought permanent legations to be wholly unnecessary. The course of events has, however, shown that Grotius's views as regards permanent legations were short-sighted. Nowadays the Family of Nations could not exist without them, as they are the channel through which nearly the whole, and certainly all important, official intercourse of the States flows.

Diplo-
macy.

✓ · § 359. The rise of permanent legations created the necessity for a new class of State officials, the so-called diplomatists; yet it was not until the end of the eight-

¹ See Nys, "Les Origines du droit international" (1894), p. 295.

² "De jure belli ac pacis," II. c. 28, § 3: "Optimo autem jure rejici

possunt, quae nunc in usu sunt, legationes assiduae, quibus cum non sit opus, docet mos antiquus, cui illae ignoratae."

eenth century that the terms "diplomatist" and "diplomacy" came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatists did not and could not exist until permanent legations had become a general institution. In this as in other cases the office has created the class of men necessary for it. International Law has nothing to do with the education and general character of these officials. Every State is naturally competent to create its own rules, if any, as regards these points. Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law. But I would notice one of these usages—namely, that as regards the language which is in use in diplomatic intercourse. This language was formerly Latin, but through the political ascendancy of France under Louis XIV. it became French. However, this is a usage of diplomacy only, and not a rule of International Law.¹ Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other. But between States of different tongues and, further, at Conferences and Congresses, it is convenient to make use of a language which is generally known. This is nowadays French, but nothing could prevent diplomatists from dropping French at any moment and adopting another language instead.

¹ See Mirus, "Das europäische Gesandtschaftsrecht," I. §§ 266–268.

II

RIGHT OF LEGATION

Grotius, II. c. 18—Vattel, IV. §§ 55–68—Hall, § 98—Phillimore, II. §§ 115–139—Taylor, §§ 285–288—Twiss, §§ 201–202—Wheaton, §§ 206–209—Bluntschli, §§ 159–165—Heffter, § 200—Geffcken in Holtzendorff, III. pp. 620–631—Ullmann, § 45—Rivier, I. § 35—Nys, II. p. 339—Bonfilis, Nos. 658–667—Pradier-Fodéré, II. Nos. 1225–1256—Fiore, II. Nos. 1112–1117—Calvo, III. §§ 1321–1325—Martens, II. §§ 7–8.

Concep-
tion of
Right of
Legation.

§ 360. Right of legation is the right of a State to send and receive diplomatic envoys. The right to send such envoys is termed active right of legation, in contradistinction to the passive right of legation, as the right to receive such envoys is termed. Some writers¹ on International Law assert that no right but a mere competence to send and receive diplomatic envoys exists according to International Law, maintaining that no State is bound by International Law to send or receive such envoys. But this is certainly wrong in its generality. Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys. But, on the other hand, the very existence² of the Family of Nations makes it necessary for the members or some of the members to negotiate occasionally on certain points. Such negotiation would be impossible in case one member could always and under all circumstances refuse to receive an envoy from the other members. The duty of every member to listen, under ordinary circumstances, to a message from another brought by a diplomatic envoy is, therefore, an outcome of its very membership of the Family of Nations, and this duty corresponds to the right of every member to send such envoys. But the exercise of the active right of legation is discretionary. No State need send diplomatic envoys at all, although practically all States

¹ See, for instance, Wheaton, § 207; Heilborn, "System," p. 182.

² See above, § 141.

do at least occasionally send such envoys, and most States send permanent envoys to many other States. The passive right of legation is discretionary as regards the reception of *permanent* envoys only.

§ 361. Not every State, however, possesses the right of legation. Such right pertains chiefly to full-Sovereign States,¹ for other States possess this right under certain conditions only.

What States possess the Right of Legation.

(1) Half-Sovereign States, such as States under the suzerainty or the protectorate of another State, can as a rule neither send nor receive diplomatic envoys. Thus, Crete and Egypt are destitute of such right, and the Powers are represented in these States only by consuls or agents without diplomatic character. But there may be exceptions to this rule. Thus, according to the Peace Treaty of Kainardgi of 1774 between Russia and Turkey, the two half-Sovereign principalities of Moldavia and Wallachia had the right of sending *Chargés d'Affaires* to foreign Powers. Thus, further, the late South African Republic, which was a State under British suzerainty in the opinion of Great Britain, used to keep permanent diplomatic envoys in several foreign States.

(2) Part-Sovereign member-States of a Federal State may or may not have the right of legation besides the Federal State. It is the constitution of the Federal State which regulates this point. Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire certainly have. Bavaria, for example, sends and receives several diplomatic envoys.

¹ It should be emphasised that the Holy See, which is in some respects treated as though an International Person, can send and receive envoys, who must in every respect be considered as though they were diplomatic envoys. That they are actually

not diplomatic envoys, although so treated, becomes apparent from the fact that they are not agents for international affairs of States, but exclusively for affairs of the Roman Catholic Church. (See above, § 106.)

Right of
Legation
by whom
exercised.

§ 362. As, according to International Law, a State is represented in its international relations by its head, it is he who acts in the exercise of his State's right of legation. But Municipal Law may, just as it designates the person who is the head of the State, impose certain conditions and restrictions upon the head as regards the exercise of such right. And the head himself may, provided that it is sanctioned by the Municipal Law of his State, delegate¹ the exercise of such right to any representative he chooses.

It may, however, in consequence of revolutionary movements, be doubtful who the real head of a State is, and in such cases it remains in the discretion of foreign States to make their choice. But it is impossible for foreign States to receive diplomatic envoys from both claimants to the headship of the same State, or to send diplomatic envoys to both of them. And as soon as a State has recognised the head of a State who came into his position through a revolution, it can no longer keep up diplomatic relations with the former head.

It should be mentioned that a revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with such party in an informal way through political agents without diplomatic character, to provide for the temporal security of the persons and property of their subjects within the territory under the actual sway of such party. Such revolutionary party as is recognised as a belligerent Power is in some points only treated as though it were a subject of International Law; but it is not a State, and there is no reason why International Law should give it the right to send and receive diplomatic envoys.

It should further be mentioned that neither an

¹ See Phillimore, II. §§ 126-133, where several interesting cases of such delegation are discussed.

abdicated nor a deposed head has a right to send and receive diplomatic envoys.¹

III

KINDS AND CLASSES OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 69-75—Phillimore, II. §§ 211-224—Twiss, I. §§ 204-209—Moore, IV. § 624—Heffter, § 208—Geffcken in Holtzendorff, III. pp. 635-646—Calvo, III. §§ 1326-1336—Bonfil, Nos. 668-676—Pradier-Fodéré, III. §§ 1277-1290—Rivier, I. pp. 443-453—Nys, II. pp. 342-352.

§ 363. Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations and such as are sent for the purpose of ceremonial function or notification of changes in the headship. For States very often send special envoys to one another on occasion of coronations, weddings, funerals, jubilees, and the like; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for real State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely, first, such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and, second, such as are sent to represent the sending State at a Congress or Conference. The latter are not, or need not be, accredited to the State on whose territory the Congress or Conference takes place, but they are nevertheless diplomatic envoys and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites.

Envoys
Cere-
monial
and
Political.

§ 364. Diplomatic envoys accredited to a State differ in class. These classes did not exist in the early stages of International Law. But during the sixteenth cen-

Classes of
Diplo-
matic
Envoys.

¹ See Phillimore, II. §§ 124-125, where the case of Bishop Ross, ambassador of Mary Queen of Scots, is discussed.

✓. tury a distinction between two classes of diplomatic envoys gradually arose, and at about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised—namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents; Ambassadors being received with higher honours and taking precedence of the other envoys. Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class—namely, the so-called Ministers Plenipotentiary. At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment of three different classes—namely, first, Ambassadors; second, Ministers Plenipotentiary and Envoys Extraordinary; third, Chargés d’Affaires. And the five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident, to rank between Ministers Plenipotentiary and Chargés d’Affaires. All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order. Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately.

Ambas-
sadors.

§ 365. Ambassadors form the first class. Only States enjoying royal honours¹ are entitled to send and to receive Ambassadors, as also is the Holy See, whose first-class envoys are called Nuncios, or Legati a latere or de latere. Ambassadors are considered to be personal representatives of the heads of their States and enjoy for this reason special honours. Their chief privilege—namely, that of negotiating with the head of the

¹ See above, § 117, No. 1.

State personally—has, however, little value nowadays, as almost all States have to a certain extent constitutional government, which necessitates that all the important business should go through the hands of a Foreign Secretary.

- § 366. The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, and have not the privilege of treating with the head of the State personally. But otherwise there is no difference between these two classes.

Ministers
Plenipo-
tentiary
and
Envoys
Extra-
ordinary.

- § 367. The third class, the Ministers Resident, enjoy fewer honours and rank below the Ministers Plenipotentiary. But beyond the fact that Ministers Resident do not enjoy the title "Excellency," there is no difference between them and the Ministers Plenipotentiary.

Ministers
Resident.

§ 368. The fourth class, the *Chargés d'Affaires*, differs chiefly in one point from the first, second, and third class—namely, in so far as its members are accredited from Foreign Office to Foreign Office, whereas the members of the other classes are accredited from head of State to head of State. *Chargés d'Affaires* do not enjoy, therefore, so many honours as other diplomatic envoys. And it must be specially mentioned that a distinction ought to be made between a *Chargé d'Affaires* who is the head of a Legation, and who, therefore, is accredited from Foreign Office to Foreign Office, and a *Chargé d'Affaires ad interim*. The latter is a member of a Legation whom the head of the Legation delegates for the purpose of taking his place during absence on leave. Such *Chargé d'Affaires ad interim*, who had better be called a *Chargé des Affaires*,¹ ranks

*Chargés
d'Affaires.*

¹ See Rivier, II. pp. 451–452.

below the ordinary Chargé d'Affaires; he is not accredited from Foreign Office to Foreign Office, but is simply a delegate of the absent head of the Legation.

The Diplomatic Corps.

§ 369. All the Diplomatic Envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the "Diplomatic Corps." The head of this body, the so-called "Doyen," is the Papal Nuncio, or, in case there is no Nuncio accredited, the oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so on. As the Diplomatic Corps is not a body legally constituted, it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.

IV

APPOINTMENT OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 76-77—Phillimore, II. §§ 227-231—Twiss, I. §§ 212-214—Ullmann, § 48—Calvo, III. §§ 1343-1345—Bonfils, Nos. 677-680—Wheaton, §§ 217-220—Moore, IV. §§ 632-635.

Person and Qualification of the Envoy.

§ 370. International Law has no rules as regards the qualification of the individuals whom a State can appoint as diplomatic envoys, States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas, regarding envoys ceremonial even the Municipal Laws have no provisions at all. The question is sometimes discussed whether females¹

¹ See Mirus, "Das europäische Gesandtschaftsrecht," I. §§ 127-128; Phillimore, II. § 134; and Focherini, "Le Signore Ambascia-

trici dei secoli XVII. e XVIII. e loro posizione nel diritto diplomatico" (1909).

might be appointed envoys. History relates a few cases of female diplomatists. Thus, for example, Louis XIV. of France accredited in 1646 Madame de Guébriant ambassador to the Court of Poland. During the last two centuries, however, no such case has to my knowledge occurred, although I doubt not that International Law does not prevent a State from sending a female as diplomatic envoy. But under the present circumstances many States would refuse to receive her.

§ 371. The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State. Letter of Credence (*lettre de créance*) is the designation of the document in which the head of the State accredits a permanent ambassador or minister to a foreign State. Every such envoy receives a sealed Letter of Credence and an open copy. As soon as the envoy arrives at his destination, he sends the copy to the Foreign Office in order to make his arrival officially known. The sealed original, however, is handed in personally by the envoy to the head of the State to whom he is accredited. Chargés d'Affaires receive a Letter of Credence too, but as they are accredited from Foreign Office to Foreign Office, their Letter of Credence is signed, not by the head of their home State, but by its Foreign Office. Now a permanent diplomatic envoy needs no other empowering document in case he is not entrusted with any task outside the limits of the ordinary business of a permanent legation. But in case he is entrusted with any such task, as, for instance, if any special treaty or convention is to be negotiated, he requires a special empowering document—namely, the so-called Full Powers (*Pleins Pouvoirs*). They are given in Letters Patent signed by the head of the State, and they are either limited or unlimited Full Powers, according to the requirements of the case. Such diplomatic

Letter of
Credence,
Full
Powers,
Passports.

envoys as are sent, not to represent their home State permanently, but on an extraordinary mission such as representation at a Congress, negotiation of a special treaty, and other transactions, receive full Powers only, and no Letter of Credence. Every permanent or other diplomatic envoy is also furnished with so-called Instructions for the guidance of his conduct as regards the objects of his mission. But such Instructions are a matter between the Envoy and his home State exclusively, and they have therefore, although they may otherwise be very important, no importance for International Law. Every permanent diplomatic envoy receives, lastly, Passports for himself and his suite specially made out by the Foreign Office. These Passports the envoy after his arrival deposits at the Foreign Office of the State to which he is accredited, where they remain until he himself asks for them because he desires to leave his post, or until they are returned to him on his dismissal.

Combined
Legations.

§ 372. As a rule, a State appoints different individuals as permanent diplomatic envoys to different States, but sometimes a State appoints the same individual as permanent diplomatic envoy to several States. As a rule, further, a diplomatic envoy represents one State only. But occasionally several States appoint the same individual as their envoy, so that one envoy represents several States.

Appoint-
ment of
several
Envoys.

§ 373. In former times States used frequently¹ to appoint more than one permanent diplomatic envoy as their representative in a foreign State. Although this would hardly occur nowadays, there is no rule against such a possibility. And even now it happens frequently that States appoint several envoys for the purpose of representing them at Congresses and Conferences. In such cases one of the several envoys is appointed senior, to whom the others are subordinate.

¹ See Mirus, op. cit. I. §§ 117-119.

V

RECEPTION OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 65-67—Hall, § 98—Phillimore, II. §§ 133-139—Twiss, I. §§ 202-203—Taylor, §§ 285-290—Moore, IV. §§ 635, 637-638—Martens, II. § 8—Calvo, III. §§ 1353-1356—Pradier-Fodéré, III. §§ 1253-1260—Fiore, II. Nos. 1118-1120—Rivier, I. pp. 455-457.

§ 374. Every member of the Family of Nations that possesses the passive right of legation is under ordinary circumstances bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But the duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys under all circumstances.

Duty to
receive
Diplo-
matic
Envoys.

(1) As regards permanent envoys, it is a generally recognised fact that a State is as little bound to receive them as it is to send them. Practically, however, every full-Sovereign State which desires its voice to be heard among the States receives and sends permanent envoys, as without such it would, under present circumstances, be impossible for a State to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice and nowadays sends and receives several. The insignificant Principality of Lichtenstein is, as far as I know, the only full-Sovereign State which neither sends nor receives one single permanent legation.

But a State may receive a permanent legation from one State and refuse to do so from another. Thus, the Protestant States never *received* a permanent legation from the Popes, even when the latter were heads of a State, and they still observe this rule, although one or another of them, such as Prussia for example, keeps a permanent legation at the Vatican.

(2) As regards temporary envoys, it is likewise a generally recognised fact among those writers who

assert the duty of a State to receive under ordinary circumstances temporary envoys that there are exceptions to that rule. Thus, for example, a State which knows beforehand the object of a mission and does not wish to negotiate thereon can refuse to receive the mission. Thus, further, a belligerent can refuse¹ to receive a legation from the other belligerent, as war involves the rupture of all peaceable relations.

Refusal to
receive a
certain
Indi-
vidual.

§ 375. But the refusal to receive an envoy must not be confounded with the refusal to receive a certain individual as envoy. A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a State to insist upon the reception of an individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself. And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State.² Thus, again, the King of Hanover refused in 1847 to receive a minister appointed by Prussia, because the individual was of the Roman Catholic faith. Italy refused in 1885 to receive Mr. Keiley as ambassador of the United States of America because he had in 1871 protested against the annexation of the Papal States.

¹ But this is not generally recognised. See Vattel, IV. § 67; Phillimore, II. § 138; and Pradier-Fodéré, III. No. 1255.

² In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it has to grant him all the privileges of such envoys, including extraterritoriality. Thus in the case of *Macartney v. Garbutt* and others (1890, L.R. 24 Q.B. 368) it was decided that a British subject accredited to Great Britain by the Chinese Government as a Secretary

of its embassy and received by Great Britain in that capacity without an express condition that he should remain subject to British jurisdiction, was exempt from British jurisdiction. See, however, article 15 of the *Règlement sur les Immunités Diplomatiques*, adopted in 1895 by the Institute of International Law (see *Annuaire*, XIV. p. 244), which denies to such an individual exemption from jurisdiction. See also Phillimore, II. § 135, and Twiss, I. § 203.

And when the United States sent the same gentleman as ambassador to Austria, the latter refused him reception on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused. Thus, in 1832 England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as above mentioned, Austria refused reception to Mr. Keiley as ambassador of the United States, the latter did not appoint another, although Mr. Keiley resigned, and the legation was for several years left to the care of a *Chargé d'Affaires*.¹ To avoid such conflicts it is a good practice of many States never to appoint an individual as envoy without having ascertained beforehand whether the individual would be *persona grata*. And it is a customary rule of International Law that a State which does not object to the appointment of a certain individual, when its opinion has been asked beforehand, is bound to receive such individual.²

§ 376. In case a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation. But the mode of reception differs according to the class to which the envoy belongs. If he be one of the first, second, or third class, it is the duty of the head of the State to receive him solemnly in a so-called public audience with all the usual ceremonies. For that purpose the

Mode and
Solemnity
of Reception.

¹ See Moore, IV. § 638, p. 480.

² The question is of interest whether the privileges due to diplomatists must be granted on his journey home to an individual to

whom reception as an envoy is refused. I think the question ought to be answered in the affirmative; see, however, Moore, IV. § 666, p. 668.

envoy sends a copy of his credentials to the Foreign Office, which arranges a special audience with the head of the State for the envoy, when he delivers in person his sealed credentials.¹ If the envoy be a *Chargé d'Affaires* only, he is received in audience by the Secretary of Foreign Affairs, to whom he hands his credentials. Through the formal reception the envoy becomes officially recognised and can officially commence to exercise his functions. But such of his privileges as exterritoriality and the like, which concern the safety and inviolability of his person, must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character.

Reception
of Envoys
to Con-
gresses
and Con-
ferences.

§ 377. It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent the several States at a Congress or Conference. As such envoys are not accredited to the State on whose territory the Congress or Conference takes place, such State has no competence to refuse the reception of the appointed envoys, and no formal and official reception of the latter by the head of the State need take place. The appointing States merely notify the appointment of their envoys to the Foreign Office of the State on whose territory the transactions take place, the envoys call upon the Foreign Secretary after their arrival to introduce themselves, and they are courteously received by him. They do not, however, hand in to him their Full Powers, but reserve them for the first meeting of the Congress or Conference, where they produce them in exchange with one another.

¹ Details concerning reception of envoys are given by Twiss, I. § 215, and Rivier, I. p. 467.

VI

FUNCTIONS OF DIPLOMATIC ENVOYS

Rivier, I. § 37—Ullmann, § 49—Bonfils, Nos. 681–683—Pradier-Fodéré, III. §§ 1346–1376.

§ 378. A distinction must be made between functions of permanent envoys and of envoys for temporary purposes. The functions of the latter, who are either envoys ceremonial or such envoys political as are only temporarily accredited for the purpose of some definite negotiations or as representatives at Congresses and Conferences, are clearly demonstrated by the very purpose of their appointment. But the functions of the permanent envoys demand a closer consideration. These regular functions may be grouped together under the heads of negotiation, observation, and protection. But besides these regular functions a diplomatic envoy may be charged with other and more miscellaneous functions.

On Diplo-
matic
Functions
in general.

§ 379. A permanent ambassador or other envoy represents his home State in the totality of its international relations not only with the State to which he is accredited, but also with other States. He is the mouthpiece of the head of his home State and its Foreign Secretary as regards communications to be made to the State to which he is accredited. He likewise receives communications from the latter and reports them to his home State. In this way not only are international relations between these two States fostered and negotiated upon, but such international affairs of other States as are of general interest to all or a part of the members of the Family of Nations are also discussed. Owing to the fact that all the more important Powers keep permanent legations accredited to one another, a constant exchange of views in regard to affairs international is taking place between them.

Negotia-
tion.

Observa-
tion.

§.380. But these are not all the functions of permanent diplomatic envoys. Their task is, further, to observe attentively every occurrence which might affect the interest of their home States, and to report such observations to their Governments. It is through these reports that every member of the Family of Nations is kept well informed in regard to the army and navy, the finances, the public opinion, the commerce and industry of foreign countries. And it must be specially observed that no State that receives diplomatic envoys has a right to prevent them from exercising their function of observation.

Protec-
tion.

§.381. A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States as are within the boundaries of the State to which they are accredited. If such subjects are wronged without being able to find redress in the ordinary way of justice, and ask the help of the diplomatic envoy of their home State, he must be allowed to afford them protection. It is, however, for the Municipal Law and regulations of his home State, and not for International Law, to prescribe to an envoy the limits within which he has to afford protection to his compatriots.

Miscel-
laneous
Functions.

§.382. Negotiation, observation, and protection are tasks common to all diplomatic envoys of every State. But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, making out of passports for them, and the like. But in doing this a State must be careful not to order its envoys to perform such tasks as are by the law of the receiving State exclusively reserved to its own officials. Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in presence of its registrars, need not allow a foreign

envoy to legalise a marriage of compatriots before its registration by the official registrar. So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath.

§ 383. But it must be specially emphasised that envoys must not interfere with the internal political life of the State to which they are accredited. It certainly belongs to their functions to watch the political events and the political parties with a vigilant eye and to report their observations to their home States. But they have no right whatever to take part in that political life itself, to encourage a certain political party, or to threaten another. If nevertheless they do so, they abuse their position. And it matters not whether an envoy acts thus on his own account or on instructions from his home State. No strong self-respecting State will allow a foreign envoy to exercise such interference, but will either request his home State to recall him and appoint another individual in his place or, in case his interference is very flagrant, hand him his passports and therewith dismiss him. History records many instances of this kind,¹ although in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics.

Envoys
not to
interfere
in Internal
Politics.

VII

POSITION OF DIPLOMATIC ENVOYS

§ 384. Diplomatic envoys are just as little subjects of International Law as are heads of States; and the arguments regarding the position of such heads² must

Diplo-
matic
Envoys
objects of
Inter-
national
Law.

¹ See Hall (§ 98**), Taylor (§ 322), and Moore (IV. § 640), who discuss a number of cases, especially that of Lord Sackville, who received his

passports in 1888 from the United States of America for an alleged interference in the Presidential election.

² See above, § 344.

also be applied to the position of diplomatic envoys, which is given to them by International Law not as individuals but as representative agents of their States. It is derived, not from personal rights, but from rights and duties of their home States and the receiving States. All the privileges which according to International Law are possessed by diplomatic envoys are not rights given to them by International Law, but rights given by the Municipal Law of the receiving States in compliance with an international right of their home States. For International Law gives a right to every State to demand for its diplomatic envoys certain privileges from the Municipal Law of a foreign State. Thus, a diplomatic envoy is not a subject but an object of International Law, and is in this regard like any other individual.

Privileges
due to
Diplo-
matic
Envoys.

§ 385. Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called extraterritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity,¹ and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals and thus more or less dependent on the good-will of the Government, they might be influenced by personal considerations of safety and comfort to such a degree as would materially hamper the exercise of their functions. It is equally clear that liability to interference with their full and free intercourse with their home States through letters, telegrams, and couriers would wholly nullify their *raison d'être*. In this case it would be impossible for them to send independent and secret reports to or receive similar instruc-

¹ See above, § 121.

tions from their home States. From the consideration of these and various cognate reasons their privileges seem to be inseparable attributes of the very existence of diplomatic envoys.¹

VIII

INVIOIABILITY OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 80-107—Hall, §§ 50, 98*—Phillimore, II. §§ 154-175—Twiss, I. §§ 216-217—Moore, IV. §§ 657-659—Ullmann, § 50—Geffcken in Holtzendorff, III. pp. 648-654—Rivier, I. § 38—Nys, II. pp. 372-374—Bonfils, Nos. 684-699—Pradier-Fodéré, III. §§ 1382-1393—Mérignhac, II. pp. 264-273—Fiore, II. Nos. 1127-1143—Calvo, III. §§ 1480-1498—Martens, II. § 11—Crouzet, "De l'invioiabilité . . . des agents diplomatiques" (1875).

§ 386. Diplomatic envoys are just as sacrosanct as heads of States. They must, therefore, on the one hand, be afforded special protection as regards the safety of their persons, and, on the other hand, they must be exempted from every kind of criminal jurisdiction of the receiving States. Now the protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments to be inflicted on offenders. Thus, according to English Criminal Law,² every one is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries, or who³ sets forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign

Protec-
tion due
to Diplo-
matic
Envoys.

¹ The Institute of International Law, at its meeting at Cambridge in 1895, discussed the privileges of diplomatic envoys, and drafted a body of seventeen rules in regard thereto; see *Annuaire*, XIV. p. 240.

² See Stephen's Digest, articles 96-97.

³ 7 Anne, c. 12. sect. 3-6. This statute, which was passed in 1708 in consequence of the Russian Ambassador in London having been arrested for a debt of £50, has always been considered as declaratory of the existing law in England, and not as creating new law.

country or the person of a servant of any such representative is arrested or imprisoned. The protection of diplomatic envoys is not restricted to their own person, but must be extended to the members of their family and suite, to their official residence, their furniture, carriages, papers, and likewise to their intercourse with their home States by letters, telegrams, and special messengers. Even after a diplomatic mission has come to an end, the archives of an Embassy must not be touched, provided they have been put under seal and confided to the protection of another envoy.¹

Exemption from Criminal Jurisdiction.

§ 387. As regards the exemption of diplomatic envoys from criminal jurisdiction, theory and practice of International Law agree nowadays² upon the fact that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys. But among writers on International Law the question is not settled whether the commands and injunctions of the laws of the receiving States concern diplomatic envoys at all, so that the latter have to comply with such commands and injunctions, although the fact is established that they can never be prosecuted and punished for any breach.³ This question ought to be decided in the negative, for a diplomatic envoy must in no point be considered under the legal authority of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his

¹ See above, § 106 (case of Montagnini), and below, § 411.

² In former times there was no unanimity amongst publicists. See Phillimore, II. § 154.

³ The point is thoroughly discussed by Beling, "Die strafrechtliche Bedeutung der Exterritorialität" (1896), pp. 71-90.

functions. In case he acts and behaves otherwise, and disturbs thereby the internal order of the State, the latter will certainly request his recall or send him back at once.

History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted. Thus, in 1584, the Spanish Ambassador Mendoza in England plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1586 the French Ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654 the French Ambassador in England, De Bass, conspired against the life of Cromwell; he was ordered to leave the country within twenty-four hours.¹

§ 388. As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or in case he conspires against the receiving State and the conspiracy can be made futile only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717 the Swedish Ambassador Gyllenburg in London, who was an accomplice in a plot against King George I., was arrested and his papers were searched. In 1718 the Spanish Ambassador Prince Cellamare in France was placed in custody because he organised a conspiracy against the French Government.² And it must be emphasised that a diplomatic envoy cannot make it a point of complaint

Limita-
tion of
Inviola-
bility.

¹ These and other cases are discussed by Phillimore, II. §§ 160-165.

² Details regarding these cases are

given by Phillimore, II. §§ 166 and 170.

if injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.¹

IX

EXTRITORIALITY OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 80-119—Hall, §§ 50, 52, 53—Westlake, I. pp. 263-273—Phillimore, II. §§ 176-210—Taylor, §§ 299-315—Twiss, I. §§ 217-221—Moore, II. §§ 291-304 and IV. §§ 660-669—Ullmann, § 50—Geffcken in Holtzendorff, III. pp. 654-659—Nys, II. pp. 353-385—Rivier, I. 38—Bonfils, Nos. 700-721—Pradier-Fodéré, III. §§ 1396-1495—Mérignhac, II. pp. 249-293—Fiore, II. Nos. 1145-1163—Calvo, III. §§ 1499-1531—Martens, II. §§ 12-14—Gottschalck, "Die Extritorialität der Gesandten" (1878)—Heyking, "L'extritorialité" (1889)—Odier, "Des privilèges et immunités des agents diplomatiques" (1890)—Vercamer, "Des franchises diplomatiques et spécialement de l'extritorialité" (1891)—Droin, "L'extritorialité des agents diplomatiques" (1895)—Mirre, "Die Stellung der völkerrechtlichen Literatur zur Lehre von den sogenannten Nebenrechten der gesandtschaftlichen Functionäre" (1904).

Reason
and Fic-
tional
Character
of Exterri-
toriality.

§.389. The extritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the Family of Nations is not, as in the case of sovereign heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, the control, and the like, of the receiving States. Extritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "Extritoriality" is nevertheless valuable, because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the

¹ See article 6 of the rules regarding diplomatic immunities adopted by the Institute of International Law

at its meeting at Cambridge in 1895 (Annuaire, XIV. p. 240).

territory of the receiving States.¹ And the so-called exterritoriality of envoys is actualised by a body of privileges which must be severally discussed.

§ 390. The first of these privileges is immunity of domicile, the so-called *Franchise de l'hôtel*. The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every point considered to be outside the territory of the receiving States, and when this exterritoriality was in many cases even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of a *Franchise du quartier* or the *Jus quarteriorum*. And an inference from this *Franchise du quartier* was the so-called right of asylum, envoys claiming the right to grant asylum within the boundaries of their residential quarters to every individual who took refuge there.² But already in the seventeenth century most States opposed this *Franchise du quartier*, and it totally disappeared in the eighteenth century, leaving behind, however, the claim of envoys to grant asylum within their official residences. Thus, when in 1726 the Duke of Ripperda, first Minister to Philip V. of Spain, who was accused of high treason and had taken refuge in the residence of the English Ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law.³ Twenty-one years later, in 1747, a similar case occurred in Sweden. A merchant named Springer was accused of high treason and took refuge

Immunity
of Domicile.

¹ With a few exceptions (see Droin, "L'exterritorialité des agents diplomatiques" (1895), pp. 32-43), all publicists accept the term and the fiction of exterritoriality.

² Although this right of asylum was certainly recognised by the States in former centuries, it is of interest to note that Grotius did

not consider it postulated by International Law, for he says of this right (II. c. 18, § 8): "Ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est." See also Bynkershoek, "De foro legat." c. 21.

³ See Martens, "Causes Célèbres," I. p. 178.

in the house of the English Ambassador at Stockholm. On the refusal of the English envoy to surrender Springer, the Swedish Government surrounded the embassy with troops and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and called back her ambassador, as Sweden refused to make the required reparation.¹ As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognised. During the nineteenth century all remains of it vanished, and when in 1867 the French envoy in Lima claimed it, the Peruvian Government refused to concede it.²

Nowadays the official residences of envoys are *in a sense and in some respects only* considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. And the stables and carriages of envoys are considered to be parts of their

¹ See Martens, "Causes Célèbres," II. p. 52.

² The South American States, Chili excepted, still grant the right to foreign envoys to afford asylum to political refugees in time of revolution. It is, however, acknowledged that this right is not based upon a rule of International Law, but merely upon *local* usage. See Hall, § 52; Westlake, I. p. 272; Moore, II. §§ 291-304; Ohlbert in A.J. III. (1909), pp. 562-595; Robbin in R.G. XV. (1908), pp. 461-508; Moore, "Asylum in Legations and Consulates, and in

Vessels" (1892). That actually in times of revolution and of persecution of certain classes of the population asylum is occasionally granted to refugees and respected by the local authorities, there is no doubt, but this occasional practice does not shake the validity of the general rule of International Law according to which there is no obligation on the part of the receiving State to grant to envoys the right of affording asylum to individuals not belonging to their suites. See, however, Moore, II. § 293.

residences. But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of envoys and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals or to other individuals not belonging to his suite. Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request, and, if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal. Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of exterritoriality, the criminal must be surrendered to the local Government. The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof. Nikitschenkow, a Russian subject not belonging to the Russian Legation, made an attempt on and wounded a member of that legation within the precincts of the embassy. The French police were called in and arrested the criminal. The Russian Government required his extradition, maintaining that, as the crime was committed inside the Russian Embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition and Russia dropped her claim.

Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the

receiving State and keep him under arrest inside the embassy with the intention of bringing him away into the power of his home State. An instance thereof is the case of the Chinaman Sun Yat Sen which occurred in London in 1896. This was a political refugee from China living in London. He was induced to enter the house of the Chinese Legation and kept under arrest there in order to be conveyed forcibly to China, the Chinese envoy contending that, as the house of the legation was Chinese territory, the English Government had no right to interfere. But the latter did interfere, and Sun Yat Sen was released after several days.

As a contrast to this case may be mentioned that of Kalkstein which occurred on the Continent in 1670. Colonel von Kalkstein, a Prussian subject, had fled to Poland for political reasons since he was accused of high treason against the Prussian Government. Now Frederic William, the great Elector of Brandenburg, ordered his diplomatic envoy at Warsaw, the capital of Poland, to obtain possession of the person of Kalkstein. On November 28, 1670, this order was carried out. Kalkstein was secretly seized, and, wrapped up in a carpet, was carried across the frontier. He was afterwards executed at Memel.

Exemption from Criminal and Civil Jurisdiction.

§ 391. The second privilege of envoys in reference to their extritoriality is their exemption from criminal and civil jurisdiction. As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed,¹ and we have here to deal with their exemption from civil jurisdiction only. No civil action of any kind as regards debts and the like can be brought against them in the Civil Courts of the receiving States. They cannot be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts. They cannot

¹ See above, §§ 387-388.

be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on the same account. Thus, when in 1772 the French Government refused the passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law.¹ But the rule that an envoy is exempt from civil jurisdiction has certain exceptions. If an envoy enters an appearance to an action against himself, or if he himself brings an action under the jurisdiction of the receiving State, the courts of the latter have civil jurisdiction in such cases over him. And the same is valid as regards real property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual, and as regards mercantile² ventures in which he might engage on the territory of the receiving State.

· § 392. The third privilege of envoys in reference to their exterritoriality is exemption from subpoena as witnesses. No envoy can be obliged, or even required, to appear as a witness in a civil or criminal or administrative Court, nor is an envoy obliged to give evidence before a Commissioner sent to his house. If, however, an envoy chooses for himself to appear as a witness or to give evidence of any kind, the Courts can make use of such evidence. A remarkable case of this kind is that of the Dutch envoy Dubois in Washington, which happened in 1856. A case of homicide occurred in

Exemption from Subpoena as witness.

¹ See Martens, "Causes Célèbres," II. p. 282.

² The statute of 7 Anne, c. 12, on which the exemption of diplomatic envoys from English jurisdiction is based, does not exclude such envoy as embarks on mercantile ventures from the benefit of the Act, and the practice of the English Courts

grants, therefore, to foreign envoys even in such cases exemption from local jurisdiction ; see the case (1859) of Magdalena Steam Navigation Co. v. Martin, 2 Ellis and Ellis 94, overruling the case of Taylor v. Best, 14 C.B. 487. See also Westlake, I. p. 267.

the presence of M. Dubois, and, as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the Court as a witness, recognising the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government. The latter, however, approved of Dubois' refusal, but authorised him to give evidence under oath before the American Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him.¹

Exemption from Police.

. § 393. The fourth privilege of envoys in reference to their extritoriality is exemption from the police of the receiving States. Orders and regulations of the police do in no way bind them. On the other hand, this exemption from police does not contain the privilege of an envoy to do what he likes as regards matters which are regulated by the police. Although such regulations can in no way bind him, an envoy enjoys the privilege of exemption from police under the presupposition that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is, therefore, expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall or even be justified in other measures of such a kind as do not injure his inviolability. Thus, for instance, if in time of plague an envoy were not

¹ See Wharton, I. § 98; Moore, IV. § 662; and Calvo, III. § 1520.

voluntarily to comply with important sanitary arrangements of the local police, and if there were great danger in delay, a case of necessity would be created and the receiving Government would be justified in the exercise of reasonable pressure upon the envoy.

§.394. The fifth privilege of envoys in reference to their exterritoriality is exemption from taxes and the like. As an envoy, through his exterritoriality, is considered not to be subjected to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation and therefore need not pay either income-tax or other direct taxes. As regards rates, it is necessary to draw a distinction. Payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although this is often¹ not done. Other rates, however, such as poor-rates and the like, he cannot be requested to pay. As regards customs duties, International Law does not claim the exemption of envoys therefrom. Practically and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys within certain limits the entry free of duty of goods intended for their own private use. If the house of an envoy is the property of his home State or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving State. Such property tax is not a personal and direct, but an indirect tax.

Exemption from Taxes and the like.

§.395. A sixth privilege of envoys in reference to their exterritoriality is the so-called Right of Chapel (*Droit de chapelle* or *Droit du culte*). This is the privilege of having a private chapel for the practice of his

Right of Chapel.

¹ As, for instance, in England where the payment of local rates cannot be enforced by suit or distress against a member of a legation; see

Parkinson v. Potter, 16 Q.B. 152, and Macartney v. Garbutt, L.R. 24 Q.B. 368. See also Westlake, I. p. 268.

own religion, which must be granted to an envoy by the Municipal Law of the receiving State. A privilege of great worth in former times, when freedom of religious worship was unknown in most States, it has at present an historical value only. But it has not disappeared, and might become again of actual importance in case a State should in the future give way to reactionary intolerance. It must, however, be emphasised that the right of chapel must only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving State need not allow its own subjects to take part therein.

Self-jurisdiction.

§. 396. The seventh and last privilege of envoys in reference to their extritoriality is self-jurisdiction within certain limits. As the members of his retinue are considered extritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate such civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue. This was done in former centuries. Thus, in 1603, Sully, who was sent by Henri IV. of France on a special mission to England, called together

a French jury in London and had a member of his retinue condemned to death for murder. The convicted man was handed over for execution to the English authorities, but James I. reprieved him.¹

X

POSITION OF DIPLOMATIC ENVOYS AS REGARDS THIRD STATES

Vattel, IV. §§ 84-86—Hall, §§ 99-101—Phillimore, II. §§ 172-175—Taylor, §§ 293-295—Moore, IV. §§ 643-644—Twiss, I. § 222—Wheaton, §§ 242-247—Ullmann, § 52—Geffcken in Holtzendorff, III. pp. 665-668—Heffter, § 207—Rivier, § 39—Nys, II. p. 390—Pradier-Fodéré, III. § 1394—Fiore, II. Nos. 1143-1144—Calvo, III. §§ 1532-1539.

§ 397. Although, when an individual is accredited as diplomatic envoy by one State to another, these two States only are directly concerned in his appointment, the question must be discussed, what position such envoy has as regards third States in those cases in which he comes in contact with them. Several such cases are possible. An envoy may, first, travel through the territory of a third State to reach the territory of the receiving State. Or, an envoy accredited to a belligerent State and living on the latter's territory may be found there by the other belligerent who militarily occupies such territory. And, lastly, an envoy accredited to a certain State might interfere with the affairs of a third State.

Possible
Cases.

§ 398. If an envoy travels through the territory of a third State incognito or for his pleasure only, there is no doubt that he cannot claim any special privileges whatever. He is in exactly the same position as any other foreign individual travelling on this territory, although by courtesy he might be treated with particular attention. But matters are different when an

Envoy
travelling
through
Territory
of third
State.

¹ See Martens, "Causes Célèbres," I. p. 391. See also the two cases reported by Calvo, III. § 1545.

envoy on his way from his own State to the State of his destination travels through the territory of a third State. If the sending and the receiving States are not neighbours, the envoy probably has to travel through the territory of a third State. Now, as the institution of legation is a necessary one for the intercourse of States and is firmly established by International Law, there ought to be no doubt whatever that such third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State. But no other privileges,¹ especially those of inviolability and extraterritoriality need be granted to the envoy.

And the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage. Thus, in 1854, Soulé, the envoy of the United States of America at Madrid, who had landed at Calais, intending to return to Madrid *via* Paris, was provisionally stopped at Calais for the purpose of ascertaining whether he intended to make a stay in Paris, which the French Government wanted to prevent, because he was a French refugee naturalised in America and was reported to have made speeches against the Emperor Napoleon. Soulé at once left Calais, and the French Government declared, during the correspondence with the United States in the matter, that there was no objection to Soulé's traversing France on his way to Madrid, but they would not allow him to make a sojourn in Paris or anywhere else in France.²

It must be specially remarked that no right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belli-

¹ The matter, which has always been disputed, is fully discussed by Twiss, I. § 222, who also quotes the

opinion of Grotius, Bynkershoek, and Vattel.

² See Wharton, I. § 97, and Moore, IV. § 643.

gerent, who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French Ambassador, Maréchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with England, at war with France, he was made a prisoner of war and sent to England.

§ 399. When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence. As military occupation does not extinguish a State subjected thereto, such envoys do not cease to be envoys. On the other hand, they are not accredited to the belligerent who has taken possession of the territory by military force, and the question is not yet settled by International Law how far the occupying belligerent has to respect the inviolability and extritoriality granted to such envoys by the law of the land in compliance with a demand of International Law. It may safely be maintained that he must grant them the right to leave the occupied territory. But must he likewise grant them the right to stay? Has he to respect their immunity of domicile and their other privileges in reference to their extritoriality? Neither customary rules nor international conventions exist as regards these questions, which must, therefore, be treated as open. The only case which occurred concerning this problem is that of Mr. Washburne, ambassador of the United States in Paris during the siege of that town in 1870 by the Germans. This ambassador claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines. But the Germans refused to grant that right, and did not alter their decision

Envoy
found by
Bellige-
rent on
occupied
Enemy
Territory.

although the Government of the United States protested.¹

Envoy
interfer-
ing with
affairs of
a third
State.

§ 400. There is no doubt that an envoy must not interfere with affairs concerning the State to which he is accredited and a third State. If nevertheless he does interfere, he enjoys no privileges whatever against such third State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the latter and not released till 1736, although France protested.²

XI

THE RETINUE OF DIPLOMATIC ENVOYS

Vattel, IV. §§ 120-124—Hall, § 51—Phillimore, II. §§ 186-193—Twiss, I. § 218—Moore, IV. §§ 664-665—Ullmann, §§ 47 and 51—Geffcken in Holtzendorff, III. pp. 660-661—Heffter, § 221—Rivier, I. pp. 458-461—Nys, II. pp. 386-390—Pradier-Fodéré, III. §§ 1472-1486—Fiore, II. Nos. 1164-1168—Calvo, III. §§ 1348-1350—Martens, II. § 16—Roederer, "De l'application des immunités de l'ambassadeur au personnel de l'ambassade" (1904), pp. 22-84.

Different
Classes of
Members
of Retinue.

§ 401. The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to four different classes. All those individuals who are officially attached to an envoy are members of the legation and are appointed by the home State of the envoy. To this first class belong the Councillors, Attachés, Secretaries of the Legation; the Chancellor of the Legation and his assistants; the interpreters, and the like; the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State and sent specially as members of the legation. A list of these

¹ See below, vol. II. § 157, and Wharton, I. § 97.

² See Martens, "Causes Célèbres," I. p. 207.

members of legation is handed over by the envoy to the Secretary for Foreign Affairs of the receiving State and is revised from time to time. The Councillors and Secretaries of Legation are personally presented to the Secretary for Foreign Affairs, and very often also to the head of the receiving State. The second class comprises all those individuals who are in the private service of the envoy and of the members of legation, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children. The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family and under his roof. And, lastly, the fourth class consists of the so-called couriers. They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations for the guarantee of the safety and secrecy of the despatches.

§ 402. It is a universally recognised¹ rule of International Law that all members of a legation are as inviolable and extraterritorial as the envoy himself. They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,² subpoena as witnesses, and taxes. They are considered, like the envoy himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered born on the territory of the home State. And it must be emphasised that it is not within the envoy's power to waive these privileges of members

Privileges
of Mem-
bers of
Legation.

¹ Some authors, however, plead for an abrogation of this rule. See Martens, II. § 16.

² A case of this kind occurred in 1904 in the United States. Mr. Gurney, Secretary of the British

Legation at Washington, was fined by the police magistrate of Lee, in Massachusetts, for furiously driving a motor-car. But the judgment was afterwards annulled, and the fine imposed remitted.

of legation, although the home State itself can waive these privileges. Thus when, in 1909, Wilhelm Beckert, the Chancellor of the German Legation in Santiago de Chili, murdered the porter of this legation, a Chilean subject, and then set fire to the Chancery in order to conceal his embezzlements of money belonging to the legation, the German Government consented to his being prosecuted in Chili; he was tried, found guilty, and executed at Santiago on July 5, 1910.

Privileges
of Private
Servants.

§ 403. It is a customary rule of International Law that the receiving State must grant to all persons in the private service of the envoy and of the members of his legation, provided such persons are not subjects of the receiving State, exemption from civil and criminal jurisdiction.¹ But the envoy can disclaim these exemptions, and these persons cannot then claim exemption from police, immunity of domicile, and exemption from taxes. Thus, for instance, if such a private servant commits a crime outside the residence of his employer, the police can arrest him; he must, however, be at once released if the envoy does not waive the exemption from criminal jurisdiction.

Privileges
of Family
of Envoy.

§ 404. Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges. His wife must certainly be granted all his privileges in so far as they concern inviolability and extritoriality. As regards, however, his children and other relatives, no general rule of International Law can safely be said to be generally recognised, but that they must be

¹ This rule seems to be everywhere recognised except in Great Britain. When, in 1827, a coachman of Mr. Gallatin, the American Minister in London, committed an assault outside the embassy, he was arrested in the stable of the embassy and

charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction. See Wharton, I. § 94, and Hall, § 50.

granted exemption from civil and criminal jurisdiction. But even this rule was formerly not generally recognised. Thus, when in 1653 Don Pantaleon Sà, the brother of the Portuguese Ambassador in London and a member of his suite, killed an Englishman named Greenway, he was arrested, tried in England, found guilty, and executed.¹ Nowadays the exemption from civil and criminal jurisdiction of such members of an envoy's family as live under his roof is always granted. Thus, when in 1906 Carlo Waddington,² the son of the Chilean envoy at Brussels, murdered the secretary of the Chilean Legation, the Belgian authorities did not take any step to arrest him. Two days afterwards, however, the Chilean envoy waived the privilege of the immunity of his son, and on March 2 the Chilean Government likewise agreed to the murderer being prosecuted in Belgium. The trial took place in July 1907, but Waddington was acquitted by the Belgian jury.

§ 405. To insure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction and afforded special protection during the exercise of their office. It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches and are sealed with the official seal must not be opened and searched. It is usual to provide couriers with special passports for the purpose of their legitimation.

Privileges
of Couriers
of Envoy.

¹ The case is discussed by Phillimore, II. § 169.

² See R.G. XIV. (1907), pp. 159-165.

XII

TERMINATION OF DIPLOMATIC MISSION

Vattel, IV. §§ 125-126—Hall, § 98²²—Phillimore, II. §§ 237-241—Moore, IV. §§ 636, 639, 640, 666—Taylor, §§ 320-323—Wheaton, §§ 250-251—Ullmann, § 53—Heffter, §§ 223-226—Rivier, I. § 40—Nys, II. p. 392—Bonfil, Nos. 730-732—Pradier-Fodéré, III. §§ 1515-1535—Fiere, II. Nos. 1169-1175—Calvo, III. §§ 1363-1367—Martens, II. § 17.

Termination in contradiction to Suspension.

§ 406. A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of such Letters of Credence as were given to an envoy for a specific time only; recall of the envoy by the sending State; his promotion to a higher class; the delivery of passports to him by the receiving State; request of the envoy for his passports on account of ill-treatment; war between the sending and the receiving State; constitutional changes in the headship of the sending or receiving State; revolutionary change of government of the sending or receiving State; extinction of the sending or receiving State; and, lastly, death of the envoy. These events must be treated singly on account of their peculiarities. But the termination of diplomatic missions must not be confounded with their suspension. Whereas from the foregoing eleven causes a mission comes actually to an end, and new Letters of Credence are necessary, a suspension does not put an end to the mission, but creates an interval during which the envoy, although he remains in office, cannot exercise his office. Suspension may be the result of various causes, as, for instance, a revolution within the sending or receiving State. Whatever the cause may be, an envoy enjoys all his privileges during the duration of the suspension.

Accomplishment

§ 407. A mission comes to an end through the fulfilment of its objects in all cases of missions for special

purposes. Such cases may be ceremonial functions like representations at weddings, funerals, coronations ; or notification of changes in the headship of a State, or representation of a State at Conferences and Congresses ; and other cases. Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home.

of Object
of Mis-
sion.

§ 408. If a Letter of Credence for a specified time only is given to an envoy, his mission terminates with the expiration of such time. A temporary Letter of Credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval between the recall of an ambassador and the appointment of his successor.

Expira-
tion of
Letter of
Credence.

§ 409. The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State. If this recall is not caused by unfriendly acts of the receiving State but by other circumstances, the envoy receives a Letter of Recall from the head, or, in case he is only a Chargé d'Affaires, from the Foreign Secretary of his home State, and he¹ hands this letter over to the head of the receiving State in a solemn audience, or in the case of a Chargé d'Affaires to the Foreign Secretary. In exchange for the Letter of Recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the head of the receiving State (or the Foreign Secretary) acknowledges the Letter of Recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey.² A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the

Recall.

¹ But sometimes his successor presents the letter recalling his predecessor to the head of the receiving State, or to the Foreign

Secretary in the case of Chargés d'Affaires.

² See the interesting cases discussed by Moore, IV. § 666.

receiving State which leads to a rupture of diplomatic intercourse, and under these circumstances the sending State may order its envoy to ask for his passports and depart at once without handing in a Letter of Recall. And, thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy. Such request of recall¹ may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall, although the sending State does not recognise the act of its envoy as misconduct.

Promo-
tion to a
higher
Class.

§ 410. When an envoy remains at his post, but is promoted to a higher class—for instance, when a *Chargé d’Affaires* is created a Minister Resident or a Minister Plenipotentiary is created an Ambassador—his original mission technically ends, and he receives therefore a new Letter of Credence.

Delivery
of Pass-
ports.

§ 411. A mission may terminate, further, through the delivery of his passports to an envoy by the receiving State. The reason for such dismissal of an envoy may be either gross misconduct on his part or a quarrel between the sending and the receiving State which leads to a rupture of diplomatic intercourse. Whenever such rupture takes place, diplomatic relations between the two States come to an end and all diplomatic privileges cease with the envoy’s departing and crossing the frontier. If the archives of the legations are not removed, they must be put under seal by the departing envoy and confided to the protection² of some other foreign legation.

Request
for Pass-
ports.

§ 412. Without being recalled, an envoy may on his own account ask for his passports and depart in consequence of ill-treatment by the receiving State. This may or may not lead to a rupture of diplomatic intercourse.

¹ Notable cases of request of recall of envoys are reported by Taylor, § 322; Hall, § 98** ; Moore, IV. § 639.

² As regards the case of Montagnini, see above, §§ 106 and 386.

§ 413. When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission nevertheless comes to an end. They receive their passports, but nevertheless they must be granted their privileges¹ on their way home.

Outbreak
of War.

§ 414. If the head of the sending or receiving State is a Sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new Letters of Credence. But if they receive new Letters of Credence, no change in seniority is considered to have taken place from the order in force before the change. And during the time between the termination of the missions and the arrival of new Letters of Credence they enjoy nevertheless all the privileges of diplomatic envoys.

Constitu-
tional
Changes.

As regards the influence of constitutional changes in the headship of republics on the missions sent or received, no certain rule exists.² Everything depends, therefore, upon the merits of the special case.

§ 415. A revolutionary movement in the sending or receiving State which creates a new government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing a Sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new Letters of Credence, but no change in seniority takes place if they receive them. It happens that in cases of revolutionary changes of government foreign States for some time neither send new Letters of Credence to their envoys nor recall them, watching the course of events in the meantime and waiting for more proof of a real settlement. In such cases the envoys are, according to an international usage, granted all privileges of

Revolu-
tionary
Changes
of Govern-
ment.

¹ See below, vol. II. § 98.

² Writers on International Law differ concerning this point. See,

for instance, Ullmann, § 53, in contradistinction to Rivier, I. p. 517.

diplomatic envoys, although in strict law they have ceased to be such. In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office¹ does not come to an end through constitutional or revolutionary changes in the headship of a State.

Extinction of sending or receiving State.

§ 416. If the sending or receiving State of a mission is extinguished by voluntary merger into another State or through annexation in consequence of conquest, the mission terminates *ipso facto*. In case of annexation of the receiving State, there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested and to take their archives away with them. In case of annexation of the sending State, the question arises what becomes of the archives and legational property of the missions of the annexed State accredited to foreign States. This question is one on the so-called succession² of States. The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other legational goods, such as the hotels, furniture, and the like. But as long as the annexation is not notified and recognised, the receiving States have no duty to interfere.

Death of Envoy.

§ 417. A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed. This is done by a member of the dead envoy's legation, or, if there be no such members, by a member of another legation accredited to the same State. The local Government must not interfere, unless at the special request by the home State of the deceased envoy.

Although the mission and therefore the privileges of

¹ See below, § 438.

² See above, § 82.

the envoy come to an end by his death, the members of his family who resided under his roof and the members of his suite enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expiration they lose their privilege of extritoriality. It must be specially mentioned that the Courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded.

CHAPTER III

CONSULS

I

THE INSTITUTION OF CONSULS

Hall, § 105—Phillimore, II. §§ 243–246—Halleck, I. p. 369—Taylor, §§ 325–326—Twiss, I. § 223—Ullmann, §§ 54–55—Bulmerincq in Holtzendorff. II. pp. 687–695—Heffter, §§ 241–242—Rivier, I. § 41—Nys, II. pp. 394–399—Calvo, III. §§ 1368–1372—Bonfils, Nos. 731–743—Pradier-Fodéré, IV. §§ 2034–2043—Martens, II. §§ 18–19—Fiore, II. Nos. 1176–1178—Warden, "A Treatise on the Origin, Nature, &c., of the Consular Establishment" (1814)—Miltitz, *Manuel des Consuls*, 5 vols (1837–1839)—Cussy, "Règlements consulaires des principaux États maritimes" (1851)—H. B. Oppenheim, "Handbuch der Consulate aller Länder" (1854)—Clercq et Vallat, "Guide pratique des consulats" (5th ed. 1898)—Salles, "L'institution des consulats, son origine, &c." (1898)—Chester Lloyd Jones, "The Consular Service of the United States. Its History and Activities" (1906)—Stowell, "Le Consul" (1909), and "Consular Cases and Opinions, &c." (1910)—Pillaut, "Manuel de droit Consulaire" (1910)—Jordan in R.I. 2nd Ser. VIII. (1906), pp. 479–507 and 717–750.

Develop-
ment of
the Insti-
tution of
Consuls.

§ 418. The roots of the consular institution go back to the second half of the Middle Ages. In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, who were called *Juges Consuls* or *Consuls Marchands*. When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries, founding factories, they brought the institution of consuls with them, the merchants belonging to the same nation electing their own consul. The competence of these consuls became, however, more and more enlarged through treaties, so-called "Capitulations," between the home States of the merchants and

the Mohammedan monarchs on whose territories these merchants had settled down.¹ The competence of consuls comprised at last the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was transferred to the West. Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, Italy (Pisa). These consuls in the West exercised, just as those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position of the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided. This change in their competence altered the position of consuls in the Christian States of the West altogether. Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen. Consequently, they did not receive much notice in the seventeenth and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping drew the attention of the Governments again to the value and importance of the institution of consuls. The institution was now systematically developed. The position of the consuls, their functions, and their privileges, were the subjects of stipulations either in commercial treaties or in special consular treaties,² and the several States enacted statutes

¹ See Twiss, I. §§ 253–263.

² Phillimore, II. § 255, gives a list of such treaties.

regarding the duties of their consuls abroad, such as the Consular Act passed by England in 1826.¹

General
Character
of Consuls.

§ 419. Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of commerce and navigation of the appointing State. As they are not diplomatic representatives, they do not enjoy the privileges of diplomatists. Nor have they, ordinarily, anything to do with intercourse between their home State and the State in which they reside. But these rules have exceptions. Consuls of Christian Powers in non-Christian States, Japan now excepted, have retained their former competence and exercise full civil and criminal jurisdiction over their countrymen. And sometimes consuls are charged with the tasks which are regularly fulfilled by diplomatic representatives. Thus, in States under suzerainty the Powers are frequently represented by consuls, who transact all the business otherwise transacted by diplomatic representatives, and who have, therefore, often the title of "Diplomatic Agents." Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul thither, who combines the consular functions with those of a diplomatic envoy. It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of "Diplomatic Agents," nor enjoy the diplomatic envoys' privileges, if such privileges are not specially provided for by treaties between the home State and the State in which they reside. Different, however, is the case in which a consul is at the same time accredited as *Chargé d'Affaires*, and in which, therefore, he combines two different offices; for as *Chargé d'Affaires* he is a diplomatic envoy and enjoys all the privileges of such an envoy, provided he has received a Letter of Credence.

¹ 6 Geo. IV. c. 87.

II

CONSULAR ORGANISATION

Hall, "Foreign Powers and Jurisdiction," § 13—Phillimore, II. §§ 253–254—Halleck, I. p. 371—Taylor, § 528—Moore, V. § 696—Ullmann, § 57—Bulmerincq in Holtzendorff, III. pp. 695–701—Rivier, I. § 41—Calvo, III. §§ 1373–1376—Bonfils, Nos. 743–748—Pradier-Fodéré, IV. §§ 2050–2055—Mérignac, II. pp. 320–333—Martens, II. § 20—Stowell, "Le Consul," pp. 186–206—"General Instructions for His Majesty's Consular Officers" (1907).

§ 420. Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*).¹ Consuls of the first kind, who are so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint Consuls of both kinds according to the importance of the consular districts. But there is a general tendency with most States to appoint professional consuls for important districts.

Different
kinds of
Consuls.

No difference exists between the two kinds of consuls as to their general position according to International Law. But, naturally, a professional consul enjoys actually a greater authority and a more important social position, and consular treaties often stipulate special privileges for professional consuls.

§ 421. As the functions of consuls are of a more or less local character, most States appoint several consuls on the territory of other larger States, limiting the

Consular
Districts.

¹ To this distinction corresponds the British Consular Service the distinction between "Consular Officers" and "Trading Consular Officers."

duties of the several consuls within certain districts of such territories or even within a certain town or port only. Such consular districts as a rule coincide with provinces of the State in which the consuls administer their offices. The different consuls appointed by a State for different districts of the same State are independent of each other and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular excepted, who correspond with their nominators only. The extent of the districts is agreed upon between the home State of the consul and the admitting State. Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him only the local authorities have to grant the consular privileges, if any.

Different
Classes of
Consuls.

§ 422. Four classes of consuls are generally distinguished according to rank: consuls-general, consuls, vice-consuls, and agents-consuls. Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate to themselves, or as the head of one very large consular district. Consuls are usually appointed for smaller districts, and for towns or even ports only. Vice-consuls are such assistants of consuls-general and consuls as themselves possess the consular character and take, therefore, the consul's place in regard to the whole consular business; they are, according to the Municipal Law of some States, appointed by the consul, subject to the approbation of his home State. Agents-consular are agents with consular character, appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district. Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, as the

appointing consul is responsible to his Government for the agents-consular. The so-called Proconsul is not a consul, but a *locum tenens* of a consul only during the latter's temporary absence or illness; he possesses, therefore, consular character for such time only as he actually is the *locum tenens*.

The British Consular Service consists of the following six ranks: (1) Agents and consuls-general, commissioners and consuls-general; (2) consuls-general; (3) consuls; (4) vice-consuls; (5) consular agents; (6) proconsuls. In the British Consular Service pro-consuls only exercise, as a rule, the notarial functions of a consular officer.

§ 423. Although consuls conduct their correspondence directly with their home Government, they are nevertheless, subordinate to the diplomatic envoy of their home Government accredited to the State in which they administer the consular offices. According to the Municipal Law of almost every State except the United States of America, the diplomatic envoy has full authority and control over the consuls. He can give instructions and orders, which they have to execute. In doubtful cases they have to ask his advice and instructions. On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

Consuls
subordi-
nate to
Diplo-
matic
Envoys.

III

APPOINTMENT OF CONSULS

Hall, § 105—Phillimore, II. § 250—Halleck, I. p. 371—Moore, V. §§ 697–700—Ullmann, § 58—Bulmerincq in Holtzendorff, III. pp. 702–706—Rivier, I. § 41—Nys, II. p. 400—Calvo, III. §§ 1378–1384—Bonfils, Nos. 749–752—Pradier-Fodéré, IV. §§ 2056–2067—Fiore, II. Nos. 1181–1182—Martens, II. § 21—Stowell, "Le Consul," pp. 207–216.

§ 424. International Law has no rules in regard to the qualifications of an individual whom a State can appoint consul. Many States, however, possess such

Qualifica-
tion of
Candi-
dates.

rules in their Municipal Law as far as professional consuls are concerned. The question, whether female consuls could be appointed, cannot be answered in the negative, but, on the other hand, no State is obliged to grant female consuls the *exequatur*, and many States would at present certainly refuse it.

No State
obliged to
admit
Consuls.

§ 425. According to International Law a State is not at all obliged to admit consuls. But the commercial interests of all the States are so powerful that practically every State must admit consuls of foreign Powers, as a State which refused such admittance would in its turn not be allowed to have its own consuls abroad. The commercial and consular treaties between two States stipulate as a rule that the contracting States shall have the right to appoint consuls in all those parts of each other's country in which consuls of third States are already or shall in future be admitted. Consequently a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State. But as long as a State has not admitted any other State's consul for a district, it can refuse admittance to a consul of the State anxious to organise consular service in that district. Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw.

What
kind of
States can
appoint
Consuls.

§ 426. There is no doubt that it is within the faculty of every full-Sovereign State to appoint consuls. As regards not full-Sovereign States, everything depends upon the special case. As foreign States can appoint consuls in States under suzerainty, it cannot be doubted that, provided the contrary is not specially stipulated between the vassal and the suzerain State, and provided the vassal State is not one which has no position within the Family of Nations,¹ a vassal State is in its turn competent to appoint consuls in foreign States. In

¹ See above, § 91.

regard to member-States of a Federal State it is the Constitution of the Federal State which settles the question. Thus, according to the Constitution of Germany, the Federal State is exclusively competent to appoint consuls, in contradistinction to diplomatic envoys who may be sent and received by every member-State of the German Empire.

§ 427. Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer. Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject to the approval of the home State. Admittance of consuls takes place through the so-called *exequatur*, granted by the head of the admitting State.¹ The diplomatic envoy of the appointing State hands the patent of the appointed consul on to the Secretary for Foreign Affairs for communication to the head of the State, and the *exequatur* is given either in a special document or by means of the word *exequatur* written across the patent. But the *exequatur* can be refused for personal reasons. Thus, in 1869 England refused the *exequatur* to an Irishman named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow. And the *exequatur* can be withdrawn for personal reasons at any moment. Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting into Spain supplies of arms for the Carlists.

Mode of
Appoint-
ment and
of Admit-
tance.

§ 428. As the appointment of consuls takes place in the interests of commerce, industry, and navigation, and has merely local importance without political consequences, it is maintained² that a State does not indirectly

Appoint-
ment of
Consuls
includes
Recog-
nition.

¹ That, in case a consul is appointed for a State which is under the protectorate of another, it is within the competence of the latter to grant or refuse the *exequatur*,

has been pointed out above, § 92, p. 144, note 4.

² Hall, §§ 26* and 105, and Moore, I. § 72.

recognise a newly created State *ipso facto* by appointing a consul to a district in such State. This opinion, however, does not agree with the facts of international life. Since no consul can exercise his functions before he has handed over his patent to the local State and received the latter's *exequatur*, it is evident that thereby the appointing State enters into such formal intercourse with the admitting State as indirectly ¹ involves recognition. But it is only if consuls are formally appointed and formally receive the *exequatur* on the part of the receiving State, that indirect recognition is involved. If, on the other hand, no formal ² appointment is made, and no formal *exequatur* is asked for and received, foreign individuals may actually with the consent of the local State exercise the functions of consuls without recognition following therefrom. Such individuals are not really consuls, although the local State allows them for political reasons to exercise consular functions.

IV

FUNCTIONS OF CONSULS

Hall, § 105—Phillimore, II. §§ 257–260—Taylor, § 327—Halleck, I. pp. 380–385—Moore, V. §§ 717–731—Ullmann, § 61—Bulmerincq in Holtzendorff, III. pp. 738–749—Rivier, I. § 42—Calvo, III. §§ 1421–1429—Bonfil, Nos. 762–771—Pradier-Fodéré, IV. §§ 2069–2113—Fiore, II. Nos. 1184–1185—Martens, II. § 23—Stowell, “Le Consul,” pp. 15–136.

On Consular
Functions
in general.

§ 429. Although consuls are appointed chiefly in the interest of commerce, industry, and navigation, they are nevertheless charged with various functions for other purposes. Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular In-

¹ See above, § 72.

² The case mentioned by Hall, § 26*, of Great Britain appointing, in 1823, consuls to the South American Republics, without gazetting the various consuls and—as must be

presumed—without the individuals concerned asking formally for the *exequatur* of the various South American States, would seem to be a case of informal appointment.

structions contain detailed rules in regard to these functions. They may be grouped under the heads of fosterage of commerce and industry, supervision of navigation, protection, notarial functions.

§ 430. As consuls are appointed in the interest of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give such information to merchants and manufacturers of the appointing State as is necessary for the protection of their commercial interests. Municipal Laws of the several States and their Consular Instructions comprise detailed rules on these consular functions, which are of the greatest importance. Consular reports, on the one hand, and consular information to members of the commercial world, on the other, have in the past and the present rendered valuable assistance to the development of commerce and industry of their home States.

Fosterage
of Com-
merce and
Industry.

§ 431. Another task of consuls consists in supervision of the navigation of the appointing State. A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship papers, to exercise the power of inspecting them on their arrival and departure, to settle disputes between the master and the crew or the passengers. He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers, attests averages. It is neither necessary nor possible to enumerate all the duties and powers of consuls in regard to supervision of navigation. Consular and commercial treaties, on the one hand, and, on the other, Municipal Laws and Consular Instructions, comprise detailed rules regarding

Super-
vision of
Naviga-
tion.

these consular functions. It should, however, be added that consuls must assist in every possible way any public vessel of their home State which enters their port, if the commander so requests. But consuls have no power of supervision over such public vessels.

→ Protec-
tion.

§ 432. The protection which consuls must be allowed by the receiving State to provide for subjects of the appointing State is a very important task. For that purpose consuls keep a register, in which these subjects can have their names and addresses recorded. Consuls make out passports, they have to render a certain assistance and help to paupers and the sick, and to litigants before the Courts. If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and has eventually to interfere on his behalf. If a foreigner dies, his consul may be approached for securing his property and for rendering all kind of assistance and help to the family of the deceased.

As a rule, a consul exercises protective functions over subjects of the appointing State only; but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district.

• Notarial
Func-
tions.

§ 433. Very important are the notarial and the like functions with which consuls are charged. They attest and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the Courts and other authorities of the appointing State. They conclude or register marriages of the latter's subjects, take charge of their wills, legalise their adoptions, register their births and deaths. They provide authorised translations for local as well as for home authorities, and furnish attestations of many kinds. All consular functions of this kind are specialised by Municipal Laws and Consular Instructions. But it should be specially observed that whereas fosterage of com-

merce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be granted to consuls by receiving States, many of their notarial functions need not be permitted by such receiving States in the absence of treaty stipulations.

V

POSITION AND PRIVILEGES OF CONSULS

Hall, § 105—Phillimore, II. §§ 261–271—Halleck, I. pp. 371–379—Taylor, §§ 326, 332–333—Moore, V. §§ 702–716—Ullmann, §§ 60 and 62—Bulmerincq in Holtzendorff, III. pp. 710–720—Rivier, I. § 42—Calvo, III. §§ 1385–1420—Bonfilis, Nos. 753–761—Pradier-Fodéré, IV. §§ 2114–2121—Fiore, II. No. 1183—Martens, II. § 22—Bodin, “Les immunités consulaires” (1899)—Stowell, “Le Consul,” pp. 137–185.

§ 434. Like diplomatic envoys, consuls are simply Position. objects of International Law. Such rights as they have are granted to them by Municipal Laws in compliance with rights of the appointing States according to International Law.¹ As regards their position, it should nowadays be an established and uncontested fact that consuls do not enjoy the position of diplomatic envoys, since no Christian State actually grants to foreign consuls the privileges of diplomatic agents. On the other hand, it would be incorrect to maintain that their position is in no way different from that of any other individual living within the consular district. Since they are appointed by foreign States and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State. Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks and for local purposes only. Yet they

¹ See above, § 384.

bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different from that of mere private individuals. This is certainly the case with regard to professional consuls, who are officials of their home State and are specially sent to the foreign State for the purpose of administering the consular office. But in regard to non-professional consuls it must likewise be maintained that the admitting State by granting the *exequatur* recognises their official position towards itself, which demands at least a special protection¹ of their persons and residences. The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only. If they want to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.

Consular
Privileges.

§ 435. From the undoubted official position of consuls no universally recognised privileges of importance emanate as yet. Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them important privileges. Such privileges as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations of a Commercial or Consular Treaty between the sending and the admitting State. I doubt not that in time the Powers will agree upon a universal treaty in regard to the position and privileges of consuls.²

¹ According to British and American practice a consul of a neutral Power accredited to the enemy State who embarks upon mercantile ventures, is not by his official position protected against seizure of his goods carried by enemy vessels, for by trading in the enemy country he acquires to a certain extent enemy

character; see the case of the Indian Chief, 3 C. Rob. 12.

² The Institute of International Law at its meeting at Venice in 1896 adopted a *Règlement sur les immunités consulaires* comprising twenty-one articles. See *Annuaire*, XV. p. 304.

Meanwhile, it is of interest to take notice of some of the more important stipulations which are to be found in the innumerable treaties between the several States in regard to consular privileges :

(1) A distinction is very often made between professional and non-professional consuls in so far as the former are accorded more privileges than the latter.

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, the latter is in regard to professional consuls often limited to crimes of a more serious character.

(3) In many treaties it is stipulated that (consular archives shall be inviolable from search or seizure.) Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers.

(4) (Inviolability of the consular buildings) is also sometimes stipulated, so that no officer of the local police, Courts, and so on, can enter these buildings without special permission of the consul. But it is then the duty of consuls to surrender criminals who have taken refuge in these buildings.

(5) (Professional consuls are often exempt from all kinds of rates and taxes,) from the liability to have soldiers quartered in their houses, and from the duty to appear in person as witnesses before the Courts. In the latter case consuls have either to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate.

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building and to (hoist the national flag.)

VI

TERMINATION OF CONSULAR OFFICE

Hall, § 105—Moore, V. § 701—Ullmann, § 59—Bulmerincq in Holtzendorff, III. p. 708—Rivier, I. § 41—Calvo, III. §§ 1382, 1383, 1450—Bonfils, No. 775—Fiore, II. No. 1187—Martens, II. § 21—Stowell "Le Consul," pp. 217–222.

Un-
doubted
Causes of
Termina-
tion.

§ 436. Death of the consul, withdrawal of the *exequatur*, recall or dismissal, and, lastly, war between the appointing and the admitting State, are universally recognised causes of termination of the consular office.

When a consul dies or war breaks out, the consular archives must not be touched by the local authorities. They remain either under the care of an *employé* of the consulate, or a consul of another State takes charge of them until the successor of the deceased arrives or peace is concluded.

Doubtful
Causes of
Termina-
tion.

§ 437. It is not certain in practice whether the office of a consul terminates when his district, through cession, conquest followed by annexation, or revolt, becomes the property of another State. The question ought to be answered in the affirmative, because the *exequatur* given to such consul originates from a Government which then no longer possesses the territory. A practical instance of this question occurred in 1836, when Belgium, which was then not yet recognised by Russia, declared that she would henceforth no longer treat the Russian consul Aegi at Antwerp as consul, because he was appointed before the revolt and had his *exequatur* granted by the Government of the Netherlands. Although Belgium gave way in the end to the urgent remonstrances of Russia, her original attitude was legally correct.

Change in
the Head-
ship of
States not
Cause of
Termina-
tion.

§ 438. It is universally recognised that, in contradistinction to a diplomatic mission, (the consular office does not come to an end through a change in the headship of the appointing or the admitting State.) Neither

a new patent nor a new *exequatur* is therefore necessary whether another king comes to the throne or a monarchy turns into a republic, or in any like case.

VII

CONSULS IN NON-CHRISTIAN STATES

Tarring, "British Consular Jurisdiction in the East" (1887)—Hall, "Foreign Powers and Jurisdiction," §§ 64–85—Halleck, I. pp. 385–398—Phillimore, II. §§ 272–277—Taylor, §§ 331–333—Twiss, I. § 136—Wheaton, § 110—Ullmann, §§ 63–65—Bulmerincq in Holtzendorff, III. pp. 720–738—Rivier, I. § 43—Nys, II. pp. 400–414—Calvo, III. §§ 1431–1449—Bonfils, Nos. 776–791—Pradier-Fodéré, IV. 2122–2138—Mérignac, II. pp. 338–351—Martens, II. §§ 24–26—Martens, "Konsularwesen und Konsularjurisdiction im Orient" (German translation from the Russian original by Skerst, 1874)—Bruillat, "Étude historique et critique sur les juridictions consulaires" (1898)—Lippmann, "Die Konsularjurisdiction im Orient" (1898)—Vergé, "Des consuls dans les pays d'occident" (1903)—Hinckley, "American Consular Jurisdiction in the Orient" (1906)—Piggott, "Exterritoriality. The Law relating to Consular Jurisdiction, &c. in Oriental Countries" (new edition, 1907)—Mandelstam, "La justice ottomane dans ses rapports avec les puissances étrangères" (1911), and in R. G. XIV. (1907), pp. 5 and 534, and XV. (1908), pp. 329–384.

§ 439. Fundamentally different from the regular position is that of consuls in non-Christian States, with the single exception of Japan. In the Christian countries of the West alone consuls have, as has been stated before (§ 418), lost jurisdiction over the subjects of the appointing States. In the Mohammedan States consuls not only retained their original jurisdiction, but the latter became by-and-by so extended through the so-called Capitulations that the competence of consuls soon comprised the whole civil and criminal jurisdiction, the power of protection of the privileges, the life, and property of their countrymen, and even the power to expel one of their countrymen for bad conduct. And custom and treaties secured to consuls inviolability, extritoriality, ceremonial honours, and miscellaneous other rights, so that there is no doubt that their posi-

Position of
Consuls
in non-
Christian
States.

tion is materially the same as that of diplomatic envoys. From the Mohammedan countries this position of consuls has been extended and transferred to China, Japan, Persia, and other non-Christian countries, but in Japan the position of consuls shrank in 1899 into that of consuls in Christian States.

Consular
Jurisdic-
tion in
non-
Christian
States.

§ 440. International custom and treaties lay down the rule only that all the subjects of Christian States residing in non-Christian States shall remain under the jurisdiction of the home State as exercised by their consuls.¹ It is a matter for the Municipal Laws of the several Christian States to organise this consular jurisdiction. All States have therefore enacted statutes dealing with this matter. As regards Great Britain, several Orders in Council and the Foreign Jurisdiction Act (53 & 54 Vict., c. 37) of 1890 are now the legal basis of the consular jurisdiction.² The working of this consular jurisdiction is, however, not satisfactory in regard to the so-called mixed cases. As the national consul has exclusive jurisdiction over the subjects of his home State, he exercises this jurisdiction also in cases in which the plaintiff is a native or a subject of another Christian State, and which are therefore called mixed cases.

Inter-
national
Courts in
Egypt.

§ 441. To overcome in some points the disadvantages of the consular jurisdiction, an interesting experiment is being made in Egypt. On the initiative of the Khedive, most of the Powers in 1875 agreed upon an organisation of International Courts in Egypt for mixed cases.³ These Courts began their functions in 1876. They are in the main competent for mixed civil cases, mixed criminal cases of importance remaining under

¹ See above, § 318.

² See Piggott, *op. cit.*

³ See Holland, "The European Concert in the Eastern Question," pp. 101-102; Scott, "The Law

Affecting Foreigners in Egypt as the Result of the Capitulations" (1907); Goudy in *The Law Quarterly Review*, XXIII. (1907), pp. 409-413.

the jurisdiction of the national consuls. There are three International Courts of first instance—namely, at Alexandria, Cairo, and Ismailia (formerly at Zagazig), and one International Court of Appeal at Alexandria. The tribunals of first instance are each composed of three natives and four foreigners, the Court of Appeal is composed of four natives and seven foreigners.

§ 442. There is no doubt that the present position of consuls in non-Christian States is in every point an exceptional one, which does not agree with the principles of International Law otherwise universally recognised. But the position is and must remain a necessity as long as the civilisation of non-Christian States has not developed their ideas of justice in accordance with Christian ideas, so as to preserve the life, property, and honour of foreigners before native Courts. The case of Japan is an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in non-Christian States as soon as they have reached a certain level of civilisation.

Exceptional
Character
of Consuls
in non-
Christian
States.

← *good??*

CHAPTER IV

MISCELLANEOUS AGENCIES

I

ARMED FORCES ON FOREIGN TERRITORY

Hall, §§ 54, 56, 102—Lawrence, § 107—Halleck, I. pp. 477–479—Phillimore, I. § 341—Taylor, § 131—Twiss, I. § 165—Wheaton, § 99—Moore, II. § 251—Westlake, I. p. 255—Stoerk in Holtzendorff, II. pp. 664–666—Rivier, I. pp. 333–335—Calvo, III. § 1560—Fiore, I. Nos. 528–529.

Armed
Forces
State
Organs.

§ 443. Armed forces are organs of the State which maintains them, because such forces are created for the purpose of maintaining the independence, authority, and safety of the State. And in this respect it matters not whether armed forces are at home or abroad, for they are organs of their home State even when on foreign territory, provided only they are there in the service of their State and not for their own purposes. For if a body of armed soldiers enters foreign territory without orders from, or without being otherwise in the service of, its State, but on its own account, be it for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State.

Occasions
for Armed
Forces
abroad.

§ 444. Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State. Thus, a State may have a right to keep troops in a foreign fortress or to send troops through foreign territory. Thus, further, a State which has been victorious in war with another may, after the conclusion of peace, occupy a part of the territory of its former opponent as a guarantee for the execution of the Treaty of Peace. After the Franco-German war,

for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. It may also be a case of necessity for the armed forces of a State to enter foreign territory and, commit acts of violence there, such as the British did in the case of the *Caroline*.¹

§ 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under the jurisdiction of the latter. A crime committed on foreign territory by a member of the force cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of its home State.² This is, however, valid only in case the crime is committed either within the place where the force is stationed, or anywhere else where the criminal was on duty. If, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the latter, not on duty but for recreation and pleasure, and then and there commit a crime, the local authorities are competent to punish them.

Position
of Armed
Forces
abroad.

§ 446. An excellent example of the position of armed forces abroad is furnished by the case of McLeod,³ which occurred in 1841. Alexander McLeod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the *Caroline*, a boat equipped for crossing into Canadian territory and taking help to the Canadian insurgents, came in 1841 on business to the State of New York, and was arrested and indicted for the killing of one Amos Durfee, a citizen

Case of
McLeod.

¹ See above, § 133, and below, § 446.

² This is nowadays the opinion of the vast majority of writers on International Law. There are, however, still a few dissenting

authorities, such as Bar ("Lehrbuch des internationalen Privat- und Strafrecht" (1892), p. 351), and Rivier (I. p. 333).

³ See Wharton, I. § 21, and Moore, II. § 179.

of the United States, on the occasion of the capture of the *Caroline*. The English Ambassador at Washington demanded the release of McLeod, on the ground that he was at the time of the alleged crime a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity. McLeod was not released, but had to take his trial; he was, however, acquitted on proof of an alibi. It is of importance to quote a passage in the reply of Mr. Webster, the Secretary of Foreign Affairs of the United States, to a note of the British Ambassador concerning this affair. The passage runs thus:—
“The Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it.”

The Casa
Blanca
Incident.

§ 446a. Another interesting example is the Casa Blanca incident. On September 25, 1908, six soldiers—three of them Germans—belonging to the French Foreign Legion which formed part of the French troops at Morocco, deserted at Casa Blanca and asked for and obtained the protection of the local German consul, who intended to take them on board a German vessel lying in the harbour of Casa Blanca. On their way to the ship, however, they were forcibly taken by the French out of the custody of the secretary of the German Consulate and a native soldier in the service of the consulate who were conducting them. Considering all Germans in Morocco without exception extraterritorial and under the exclusive jurisdiction of her consul, Germany complained of this act of force and demanded that those of the deserters concerned who were German subjects should be given up to her by France, acknowledging the fact that the consul had no right to extend

his protection to other than German subjects. France refused to concede this demand, maintaining that the individuals concerned had even after their desertion remained under the exclusive jurisdiction of their corps, which formed part of a French force occupying foreign territory. As the parties could not settle the conflict diplomatically, they agreed, on November 24, 1908, to bring it before the Hague Court of Arbitration, which gave its award¹ on May 22, 1909, on the whole in favour of France. The Court considered: that there was a conflict of jurisdiction with regard to the German deserters because they were as German subjects under the exclusive jurisdiction of the German Consulate, but as deserters from the French Foreign Legion under the exclusive jurisdiction of the French Army of Occupation; that under the circumstances of the case the jurisdiction of the Army of Occupation should have the preference; that nevertheless the German consul was not to be blamed for his action on account of the fact that in a country granting extraterritorial jurisdiction to foreigners the question of the respective competency of the consular jurisdiction and of the jurisdiction of an Army of Occupation was very complicated and had never been settled in an express, distinct, and universally recognised manner; that, since the German deserters were found at the port under the actual protection of the German Consulate and this protection was not manifestly illegal, the actual situation should, as far as possible, have been respected by the French military authority; that therefore the French military authorities ought to have confined themselves to preventing the embarkation and escape of the deserters, and, before proceeding to their arrest and imprisonment, to have offered to leave them in sequestration of the

¹ See Martens, N.R.G. 3rd Ser. II. (1910), p. 19. An English translation of the Award is printed in A.J. III. (1909), p. 755.

German Consulate until the question of the competent jurisdiction had been decided. The Court did not, however, decree the restitution on the part of France of the three German deserters to Germany.¹

II

MEN-OF-WAR IN FOREIGN WATERS

Hall, §§ 54-55—Halbeck, I. pp. 215-230—Lawrence, §§ 107-109—Phillimore, II. §§ 344-350—Westlake, pp. 256-259—Taylor, § 261—Moore, II. §§ 252-256—Twiss, I. § 165—Wheaton, § 100—Bluntschli, § 321—Stoerk in Holtzendorff, II. pp. 434 and 446—Perels, §§ 11, 14, 15—Heilborn, "System," pp. 248-279—Rivier, I. pp. 333-335—Bonfils, Nos. 614-623—Mérignhac, II. pp. 554-564—Calvo, III. §§ 1550-1559—Fiore, I. Nos. 547-550—Testa, p. 86—Jordan, R.I. 2nd Ser. X. (1908), p. 343.

Men-of-war State Organs.

§ 447. Men-of-war are State organs just as armed forces are, a man-of-war being in fact a part of the armed forces of a State. And respecting their character as State organs, it matters nought whether men-of-war are at home or in foreign territorial waters or on the High Seas. But it must be emphasised that men-of-war are State organs only as long as they are manned and under the command of a responsible officer, and, further, as long as they are in the service of a State. A shipwrecked man-of-war abandoned by her crew is no longer a State organ, nor does a man-of-war in revolt against her State and sailing for her own purposes retain her character as an organ of a State. On the

¹ The ambiguity of the award has justly been severely criticised. If, as the Court correctly asserts, the jurisdiction of an Army of Occupation must prevail over the jurisdiction of a consul over his nationals in a country granting extraterritorial jurisdiction, a decision of the conflict on mere legal grounds would have to be entirely in favour of France, for it is difficult to see how a wrongfully acquired and illegally asserted protection can create any obligation on the part of those who

are exclusively competent to exercise jurisdiction. But it is a well-known fact that Courts of Arbitration frequently endeavour to give an award which satisfies both parties and the ambiguity of the award in the Casa Blanca incident is manifestly due to this fact. The award is not of such a kind as one would expect from a Court of Justice, although it may be an excellent specimen of an arbitral decision. See A.J. III. (1909), pp. 698-701.

other hand, public vessels in the service of the police and the Custom House of a State; further, private vessels chartered by a State for the transport of troops and war materials; and, lastly, vessels carrying a head of a State and his suite exclusively, are also considered State organs, and are, consequently, in every point treated as though they were men-of-war.

§ 448. The character of a man-of-war or of any other vessel treated as a man-of-war is, in the first instance, proved by their outward appearance, such vessels flying the war flag and the pennant of their State.¹ If, nevertheless, the character of the vessel seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war. And it is by no means necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character. Vessels chartered by a State for the transport of troops or for the purpose of carrying its head are indeed not the property of such State, although they bear, by virtue of their commission, the same character as men-of-war.²

Proof of
Character
as Men-of-
war.

§ 449. Whereas armed forces in time of peace have

Occasions
for Men-
of-war
abroad.

¹ Attention ought to be drawn here to Convention VII. (concerning the conversion of merchant-ships into war-ships) of the second Hague Peace Conference of 1907. Although this convention concerns the time of war only, it is indirectly of importance for the time of peace. Its stipulations are the following:—No merchant-ship converted into a war-ship can have the rights and duties appertaining to that status unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies (art. 1). Merchant-ships converted into war-ships must bear the external marks which distinguish the war-ships of their nationality (art. 2).

The commander must be in the service of the State and duly commissioned by the proper authorities. His name must figure on the list of the officers of the military fleet (art. 3). The crew must be subject to the rules of military discipline (art. 4). Every merchant-ship converted into a war-ship is bound to observe, in its operations, the laws and customs of war (art. 5). A belligerent who converts a merchant-ship into a war-ship must, as soon as possible, announce such conversion in the list of the ships of its military fleet (art. 6).

² Privateers used to enjoy the same character and exemptions as men-of-war.

no occasion to be abroad, cases of a special right from a convention and cases of necessity excepted, men-of-war of all maritime States possessing a navy are constantly crossing the High Seas in all parts of the world for all kinds of purposes. Occasions for men-of-war to sail through foreign territorial waters and to enter foreign ports necessarily arise therefrom. And a special convention between the flag-State and the littoral State is not necessary to enable a man-of-war to enter and sail through foreign territorial waters and to enter a foreign port. All territorial waters and ports of the civilised States are, as a rule, quite as much open to men-of-war as to merchantmen of all nations, provided they are not excluded by special international stipulations or special Municipal Laws of the littoral States. On the other hand, it must be emphasised that, provided special international stipulations or special treaties between the flag-State and the littoral State do not prescribe the contrary in regard to one port or another and in regard to certain territorial waters, a State is in strict law always competent to exclude men-of-war from all or certain of its ports, and from those territorial waters which do not serve as highways for international traffic.¹ And a State is, further, always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges.

Position
of Men-of-
war in
foreign
waters.

§ 450. The position of men-of-war in foreign waters is characterised by the fact that they are called "floating" portions of the flag-State. For at the present time a customary rule of International Law is universally recognised that the owner State of the waters into which foreign men-of-war enter must treat them in

¹ The matter is controversial. See above, § 188, and Westlake, I. p. 192, in contradistinction to Hall, § 42.

every point as though they were floating portions of their flag-State.¹ Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters. No official of the littoral State is allowed to board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities. Individuals who are subjects of the littoral State and are only temporarily on board may, although they need not, be taken to the home country of the vessel to be there punished if they commit a crime on board. Even individuals who do not belong to the crew, and who after having committed a crime on the territory of the littoral State have taken refuge on board, cannot be forcibly taken off the vessel; if the commander refuses their surrender, it can be obtained only by means of diplomacy from the home State.

On the other hand, men-of-war cannot do what they like in foreign waters. They are expected voluntarily to comply with the laws of the littoral States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like. A man-of-war which refuses to do so can be expelled, and, if on such or other occasions she commits

¹ This rule became universally recognised during the nineteenth century only. On the change of doctrines formerly held in this country and the United States of America, see Hall, § 54, and Lawrence, § 107. English and American Courts now recognise the extritoriality of foreign public vessels. Thus, in the case of the *Exchange* (7 Cranch, 116), the Supreme Court of the United States recognised the fact that the latter had no jurisdiction over this French man-of-war. In the case of the *Constitution*, an American man-of-

war, the High Court of Admiralty in 1879 held that foreign public ships cannot be sued in English Courts for salvage (L.R., 4 P.D. 39). And in the case of the *Parlement Belge* (L.R. 5 P.D. 197) the Court of Appeal, affirmed by the House of Lords in 1878, held that foreign public vessels cannot be sued in English Courts for damages for collision. Again the same was held in 1906 in the case of the *Jassy*, a Roumanian ship, 10 Aspinall, Mar. Cas. p. 278. See also the *Charkieh* (1873), L.R. 4 Adm. and Ecol. 59.

acts of violence against the officials of the littoral State or against other vessels, steps may be taken against her to prevent further acts of violence. But it must be emphasised that even by committing acts of violence a man-of-war does not fall under the jurisdiction of the littoral State. Only such measures are allowed against her as are necessary to prevent her from further acts of violence.¹

Position
of Crew
when on
Land
abroad.

§ 451. Of some importance is the unsettled question respecting the position of the commander and the crew of a man-of-war in foreign ports when they are on land.

The majority of publicists distinguish between a stay on land in the service of the man-of-war and a stay for other purposes.² The commander and members of the crew on land officially in the service of their vessel, to buy provisions or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even for crimes they commit on the spot. Although they may, if the case makes it necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not officially, but for purposes of pleasure and recreation, they are under the territorial supremacy of the littoral State like any other foreigners, and they may be punished for crimes committed ashore.

There are, however, a number of publicists³ who do not make this distinction, and who maintain that commanders or members of the crew whilst ashore are in every case under the local jurisdiction.

¹ Attention ought to be drawn to the "*Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*," adopted by the Institute of International Law, in 1898, at its meeting at the Hague of which articles 8-24 deal with men-of-war in foreign waters; see *Annuaire*, XVII. (1898), pp. 275-280.

² So also Moore, II. § 256.

³ See, for instance, Hall, § 55; Phillimore, I. § 346; Testa, p. 109. See also art. 18 of the "*Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*," adopted by the Institute of International Law, in 1898, at its meeting at the Hague (*Annuaire*, XVII. (1898), p. 278).

III

AGENTS WITHOUT DIPLOMATIC OR CONSULAR
CHARACTER

Hall, §§ 103-104*—Moore, IV. § 623—Bluntschli, §§ 241-243—Ullmann, §§ 66-67—Heffter, § 222—Rivier, I. § 44—Calvo, III. §§ 1337-1339—Fiore, II. Nos. 1188-1191—Martens, II. § 5—Adler, "Die Spionage" (1906), pp. 63-92.

§ 452. Besides diplomatic envoys and consuls, States may and do send various kinds of agents abroad—namely, public political agents, secret political agents, spies, commissaries, bearers of despatches. Their position is not the same, but varies according to the class they belong to, and they must therefore be severally treated.

Agents
lacking
diplo-
matic or
consular
character.

§ 453. Public political agents are agents sent by one Power to another for political negotiations of different kinds. They may be sent for a permanency or for a limited time only. As they are not invested with diplomatic character, they do not receive a Letter of Credence, but a letter of recommendation or commission only. They may be sent by one full-Sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty. Public (or secret) political agents without diplomatic character are, in fact, the only means for personal political negotiations with such insurgents and States under suzerainty.

Public
Political
Agents.

As regards the position and privileges of such agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys.¹ But, on the other hand, they have a public character, being admitted as public political agents of a foreign State. They must, therefore, certainly be granted a special protection, but

¹ Heffter, § 222, is, as far as I know, the only publicist who maintains that agents not invested with

diplomatic character must nevertheless be granted the privileges of diplomatic envoys.

no distinct rules concerning special privileges to be granted to such agents seem to have grown up in practice. Inviolability of their persons and official papers ought to be granted to them.¹

Secret
Political
Agents.

§ 454. Secret political agents may be sent for the same purposes as public political agents. But two kinds of secret political agents must be distinguished. An agent may be secretly sent to another Power with a letter of recommendation and admitted by that Power. Such agent is a secret one in so far as third Powers do not know, or are not supposed to know, of his existence. As he is, although secretly, admitted by the receiving State, his position is essentially the same as that of a public political agent. On the other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task. Such agent has no recognised position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. Such secret agents are often abroad for the purpose of watching the movements of political refugees or partisans, or of Socialists, Anarchists, Nihilists, and the like. As long as such agents do not turn into so-called agents provocateurs, the local authorities will not interfere.

Spies.

§ 455. Spies are secret agents of a State sent abroad² for the purpose of obtaining clandestinely information

¹ Ullmann, § 66, and Rivier, I. § 40, maintain that they *must* be granted the privilege of inviolability to the same extent as diplomatic envoys.

² Concerning spies in time of war, see below, vol. II. §§ 159 and 210, and Adler, "Die Spionage" (1906), pp. 7-62.

in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is neither morally nor politically and legally considered wrong to send spies, such agents have, of course, no recognised position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. And a spy cannot legally excuse himself by pleading that he only executed the orders of his Government. The latter, on the other hand, will never interfere, since it cannot officially confess to having commissioned a spy.

§ 456. Commissaries are agents sent with a letter of recommendation or commission by one State to another for negotiations, not of a political but of a technical or administrative character only. Such commissaries are, for instance, sent and received for the purpose of arrangements between the two States as regards railways, post, telegraphs, navigation, delineation of boundary lines, and so on. A distinct practice of guaranteeing certain privileges to such commissaries has not grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter officially the territory of a State with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government.

Com-
missaries.Bearers
of Des-
patches.

§ 457. Individuals commissioned to carry official

despatches from a State to its head or to diplomatic envoys abroad are agents of such State. Despatch-bearers who belong to the retinue of diplomatic envoys as their couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction and a special protection in the State to which the envoy is accredited, and a right of innocent passage through third States. But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted inviolability for their person and official papers, provided they possess special passports stating their official character as despatch-bearers. And the same is valid respecting bearers of despatches between the head of a State who is temporarily abroad and his Government at home.

IV

INTERNATIONAL COMMISSIONS

Rivier, I. pp. 564–566—Ullmann, § 68—Gareis, §§ 51–52—Liszt, § 16—Moore, IV. § 623.

Perma-
nent in
Contradis-
tinction to
Tem-
porary
Commis-
sions.

§ 458. A distinction must be made between temporary and permanent international commissions. The former consist of commissaries delegated by two or more States to arrange all kinds of non-political matters, such as railways, post, telegraphs, navigation, boundary lines, and the like. Such temporary commissions dissolve as soon as their purpose is realised.¹ Besides temporary commissions, there are, however, permanent

¹ The position of their members has been discussed above, § 456. Quite novel institutions are the International Commissions of Inquiry recommended by the Hague Peace Conferences of 1890 and 1907. Articles 9 to 36 of the Hague Convention for the peaceful adjustment of international differences provide that, in international differences

involving neither honour nor vital interests, and arising from a difference of opinion on matters of fact, the parties should institute an International Commission of Inquiry; this commission to present a report to the parties, which shall be limited to a statement of the facts. See below, vol. II. § 5.

commissions in existence. They have been instituted by the Powers ¹ in the interest of free navigation on two international rivers and the Suez Canal; further, in the interest of international sanitation; thirdly, in the interest of the foreign creditors of several States unable to pay the interest on their stocks; and, lastly, concerning bounties on sugar.

As regards the privileges to be granted to the members of either temporary or permanent international commissions, no distinct practice has grown up. If the treaty according to which a commission concerned does not stipulate anything as regards such privileges, none need be granted, but the persons of the commissioners must be specially protected. However that may be, there is no doubt that members of international commissions cannot, unless this be specially stipulated, claim the privileges of diplomatic envoys. Thus, when in 1796 Messrs. Gore and Pinkney,² the American Commissioners in London under article 7 of the Jay Treaty, claimed these privileges, Great Britain refused to concede them.

§ 459. Four international commissions have been instituted in the interest of navigation—namely, two for the river Danube, one for the Congo river, and one for the Suez Canal.

Com-
missions
in the
interest
of Naviga-
tion.

1. With regard to navigation on the Danube, the European Danube Commission was instituted by

¹ Only such permanent commissions are mentioned in the text as have been instituted by the Powers in conference. There are, however, many permanent commissions in existence which have been instituted by neighbouring Powers for local purposes, as for example:—
(1) The American-Canadian International Fisheries Commission, instituted according to article 1 of the Treaty of Washington of April 11, 1908; see Treaty Series, 1908, No. 17. (2) The American-Canadian

International Joint Commission concerning boundary waters, instituted by articles 7–12 of the Treaty of Washington of January 11, 1909; see Treaty Series, 1910, No. 23. (3) The permanent Mixed Fisheries Commission between the United States, Canada, and Newfoundland, instituted in consequence of the award of the Hague Court of Arbitration in the North Atlantic Fisheries Case.

² See Moore, IV. § 623, p. 428.

article 16 of the Peace Treaty of Paris in 1856. This commission, whose members are appointed by the signatory Powers of the Treaty of Paris, was reconstituted by the Berlin Conference in 1878 and again by the Conference of London in 1883. The commission is totally independent of the territorial Governments, its rights are clearly defined, and its members, offices, and archives enjoy the privilege of inviolability. The competence of the European Danube Commission comprehends the Danube from Ibraila downwards to its mouth.¹

2. The above-mentioned London Conference of 1883 has sanctioned regulations² in regard to the navigation and river-police of the Danube from the Iron Gates down to Ibraila, and has, by article 96 of these regulations, instituted the Mixed Commission of the Danube to enforce the observance of the regulations. The members of this Commission are delegates from Austria-Hungary, Bulgaria, Roumania, Servia, and the European Danube Commission—one member from each.³

3. The Powers represented at the Berlin Congo Conference of 1884 have sanctioned certain regulations in regard to navigation on the Congo river, and have, by articles 17–21 of the General Act of the Conference, instituted an International Commission of the Congo to enforce the observance of these regulations. This Commission, in which every signatory Power may be represented by one member, is totally independent of the territorial Governments, and its members, offices, and archives enjoy the privilege of inviolability.⁴

4. By article 8 of the Treaty of Constantinople of 1888 in regard to the neutralisation of the Suez Canal, a Commission was instituted for the supervision of the

¹ Details in Twiss, I. §§ 150–152.

² Martens, N.R.G. 2nd Ser. IX. p. 394.

³ Details in Twiss, § 152.

⁴ Details in Calvo, I. § 334. According to Liszt, § 16, II. 3, this Commission has never been appointed.

execution of that treaty. The Commission consists of all the consuls of the signatory Powers in Egypt.¹

§ 460. Three international commissions in the interest of sanitation are in existence. For the purpose of supervising the sanitary arrangements in connection with the navigation on the lower part of the Danube, the International Council of Sanitation was instituted at Bucharest in 1881.² The *Conseil supérieur de santé* at Constantinople has the task of supervising the arrangements concerning cholera and plague. The *Conseil sanitaire maritime et quarantenaire* at Alexandria has similar tasks and is subject to the control of the *Conseil supérieur de santé* at Constantinople.³ As regards the International Health Office at Paris, see below, § 590, No. 6.

Commis-
sions in
the in-
terest of
Sanita-
tion.

§ 461. Three international commissions in the interest of foreign creditors are in existence—namely, in Turkey since 1878, in Egypt since 1880, and in Greece since 1897.⁴

Commis-
sions in
the In-
terest of
Foreign
Creditors.

§ 462. According to article 7 of the Brussels Convention concerning bounties on sugar, a permanent commission was instituted in 1902 at Brussels.⁵

Perma-
nent Com-
mission
concern-
ing Sugar.

V

INTERNATIONAL OFFICES

Rivier, I. pp. 564–566—Nys, II. pp. 264–270—Ullmann, § 58—Liszt, § 17—Gareis, § 52—Descamps, “Les offices internationaux et leur avenir” (1894).

§ 463. During the second half of the nineteenth century a great number of general treaties were entered into by a greater or lesser number of States for the pur-

Character
of Inter-
national
Offices.

¹ See above, § 183.

² See article 6 of the *Acte additionnel à l'Acte public du 2 novembre 1865 pour la navigation des embouchures du Danube*, signed on May 28, 1881; Martens, N.R.G. 2nd Ser. VIII. p. 207.

³ Details in Liszt, § 16, III., where likewise information is to be found as regards the *Conseil sanitaire* at

Tangiers, which consists of all the foreign envoys in Morocco.

⁴ See Kaufmann, “Das internationale Recht der ägyptischen Staatsschuld” (1891), and Murat, “Le contrôle international sur les finances de l’Égypte, de la Grèce et de la Turquie” (1899).

⁵ See below, § 585, No. 3.

pose of settling in common certain non-political matters. These general treaties create so-called unions among the parties, and the business of these unions is in most cases transacted by international offices created specially for that purpose. The functionaries of these offices, however, ordinarily enjoy no privilege whatever. The number of these offices is constantly increasing. Only the more important ones are here enumerated, with the exclusion of the International Bureau of Arbitration,¹ which, although an international office, has no relation to those here discussed.

Inter-
national
Telegraph
Offices.

§ 464. In 1868 the international telegraph office of the International Telegraph Union was created at Berne. It is administered by four functionaries under the supervision of the Swiss Bundesrath. It edits the *Journal Télégraphique* in French.² Connected with this office is, since 1906, the International Office for Radiotelegraphy.³

Inter-
national
Post
Office.

§ 465. The pendant of the international telegraph office is the international post office of the Universal Postal Union created at Berne in 1874. It is administered by seven functionaries under the supervision of the Swiss Bundesrath, and edits a monthly, *L'Union Postale*, in French, German, and English.⁴

Inter-
national
Office of
Weights
and
Measures.

§ 466. The States which have introduced the metric system of weights and measures created in 1875 the international office of weights and measures in Paris. Of functionaries there are a director and several assistants. Their task is the custody of the international prototypes of the metre and kilogramme and the comparison of the national prototypes with the international.⁵

Inter-
national
Office for
the Pro-
tection of
Works of

§ 467. In 1883 an International Union for the Protection of Industrial Property, and in 1886 an International Union for the Protection of Works of Literature

¹ See below, § 474.

² See below, § 582, No. 2.

³ See below, § 582, No. 4.

⁴ See below, § 582, No. 1.

⁵ See below, § 588, No. 1.

and Art, were created, with an international office in Berne. There are a secretary-general and three assistants, who edit a monthly, *Le Droit d'Auteur*, in French.¹

Literature
and Art
and of
Industrial
Property.

§ 467a. The first Pan-American Conference of 1889 created "The American International Bureau," which, since the fourth Conference of 1910, bears the name "The Pan-American Union." There are a director, an assistant director, and several secretaries. This office² publishes a "Monthly Bulletin."

The Pan-
American
Union.

§ 468. In accordance with the General Act of the Anti-Slavery Conference of Brussels, 1890, the International Maritime Office at Zanzibar and the "Bureau Spécial" at Brussels were established; the latter is attached to the Belgian Foreign Office at Brussels.³

Maritime
Office at
Zanzibar,
and
Bureau
Spécial at
Brussels.

§ 469. The International Union for the Publication of Customs Tariffs, concluded in 1890, has created an international office⁴ at Brussels. There are a director, a secretary, and ten translators. The office edits the *Bulletin des Douanes* in French, German, English, Italian, and Spanish.

Inter-
national
Office of
Customs
Tariffs.

§ 470. Nine States—namely, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, Switzerland—entered in 1890 into an international convention in regard to transports and freights on railways and have created the "Office Central des Transports Internationaux" at Berne.

Central
Office of
Inter-
national
Trans-
ports.

§ 471. The States which concluded on March 5, 1902, at Brussels the Convention concerning bounties on sugar⁵ have, in compliance with article 7 of this Convention, instituted a permanent office at Brussels. The task of this office, which is attached to the permanent commission,⁷ also instituted by article 7, is to

Perman-
ent Office
of the
Sugar
Conven-
tion.

¹ See below, §§ 584 and 585, No. 2.

² See below, § 595.

³ See below, § 592, No. 1.

⁴ See below, § 585, No. 1.

⁵ See below, § 583, No. 1.

⁶ See below, § 585, No. 3.

⁷ See above, § 462.

collect, translate, and publish information of all kinds respecting legislation on and statistics of sugar.

Agricul-
tural
Institute.

§ 471a. In 1905 the Agricultural Institute¹ was established at Rome. It consists of a General Assembly and a Permanent Committee with a general secretary.

Inter-
national
Health
Office.

§ 471b. In 1907 the International Health Office² was established at Paris. It consists of a director, a general secretary, and a number of clerks. It publishes at least once a month a bulletin in French.

VI

THE INTERNATIONAL COURT OF ARBITRATION

Lawrence, § 221—Bonfils, No. 970³—Despagnet, Nos. 736–740.

Organisa-
tion of
Court in
general.

§ 472. In compliance with articles 20 to 29 of the Hague Convention for the peaceful adjustment of international differences, the signatory Powers in 1900 organised the International Court of Arbitration at the Hague. This organisation comprises three distinct bodies—namely, the Permanent Administrative Council of the Court, the International Bureau of the Court, and the Court of Arbitration itself. But a fourth body must also be distinguished—namely, the tribunal to be constituted for the decision of every case. Articles 20 to 29 are now replaced by articles 41 to 50 of the Convention for the peaceful adjustment of international differences produced by the second Hague Peace Conference of 1907.

The Per-
manent
Council.

§ 473. The Permanent Council (article 49) consists of the diplomatic envoys of the contracting Powers accredited to Holland and the Dutch Secretary for Foreign Affairs, who acts as president of the Council. The task of the Council is the control of the Inter-

¹ See below, § 586, No. 1.

² See below, § 590, No. 6.

national Bureau of the Court, the appointment, suspension, and dismissal of the *employés* of the bureau, the fixing of the payments and salaries, the control of the general expenditure, and the decision of all questions of administration with regard to the business of the Court. The Council has, further, the task of furnishing the signatory Powers with a report of the proceedings of the Court, the working of the administration, and the expenses. At meetings duly summoned, the presence of nine members is sufficient to give the Council power to deliberate, and its decisions are taken by a majority of votes.

§ 474. The International Bureau (article 43) serves as the Registry for the Court. It is the intermediary for communications relating to the meetings of the Court. It has the custody of the archives and the conduct of all the administrative business of the Court. The contracting Powers have to furnish the Bureau with a certified copy of every stipulation concerning arbitration arrived at between them, and of any award concerning them rendered by a special tribunal. They likewise have to communicate to the Bureau the laws, regulations, and documents, if any, showing the execution of the awards given by the Court. The Bureau is (article 47) authorised to place its premises and its staff at the disposal of the contracting Powers for the work of any special¹ tribunal of arbitration not constituted within the International Court of Arbitration. The expense (article 50) of the Bureau is borne by the signatory Powers in the proportion established for the International Office of the International Postal Union.

The International Bureau.

§ 475. The Court of Arbitration (article 44) consists of a large number of individuals "of recognised competence in questions of International Law, enjoying the highest moral reputation," selected and appointed by

The Court of Arbitration.

¹ See below, vol. II. § 20.

the contracting Powers. No more than four members may be appointed by one Power, but two or more Powers may unite in the appointment of one or more members, and the same individual may be appointed by different Powers. Every member is appointed for a term of six years, but his appointment may be renewed. The place of a resigned or deceased member is to be refilled by the respective Powers, and in this case the appointment is made for a fresh period of six years. The names of the members of the Court thus appointed are enrolled upon a general list, which is to be kept up to date and communicated to all the contracting Powers. The Court thus constituted has jurisdiction over all cases of arbitration, unless there shall be an agreement between the parties for a special tribunal of arbitrators not selected from the list of the members of the Court (article 42).

The De-
ciding
Tribunal.

§ 476. The Court of Arbitration does not as a body decide the cases brought before it, but a tribunal is created for every special case by selection of a number of arbitrators from the list of the members of the Court. This tribunal (article 45) may be created directly by agreement of the parties. If this is not done, the tribunal is formed in the following manner:—Each party selects two arbitrators from the list, of whom one only can be its national or chosen from the persons appointed by it as members of the Permanent Court, and the four arbitrators so appointed choose a fifth as umpire and president. If the votes of the four are equal, the parties entrust to a third Power the choice of the umpire. If the parties cannot agree in their choice of such third Power, each party nominates a different Power, and the umpire is chosen by the united action of the Powers thus nominated. If within two months' time these two Powers cannot come to an agreement, each of them presents two candidates from the list of members of

the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Which of the candidates thus selected shall be the umpire is determined by lot.

After this is done, the tribunal is constituted, and the parties communicate to the International Bureau of the Court the names of the members of the tribunal, which meets at the time fixed by the parties; the members of the tribunal must be granted the privileges of diplomatic envoys when discharging their duties outside their own country (article 46). The tribunal sits at the Hague (article 43), and, except in case of *force majeure*, the place of session can only be altered by the tribunal with the assent of the parties, but the parties can from the beginning designate another place than the Hague as the venue of the tribunal (article 60). The expenses of the tribunal are paid by the parties in equal shares, and each party pays its own expenses (article 85).¹

The following nine awards have hitherto been given by the Permanent Court of Arbitration :—

(1) On October 14, 1902, in the case of the United States of America *v.* Mexico concerning the *Fonds pieux des Californias*; see Martens, N.R.G. 2nd Ser. XXXII. (1905), p. 193.

(2) On February 22, 1904, in the case of Germany, Great Britain, and Italy *v.* Venezuela concerning certain claims of their subjects; see Martens, N.R.G. 3rd Ser. I. (1909), p. 57.

(3) On May 22, 1905, in the case of Germany, France, and Great Britain *v.* Japan concerning the interpretation of article 18 of the treaty of April 4, 1896, and of other treaties; see Martens, N.R.G. 2nd Ser. XXXV. (1908), p. 376.

(4) On August 8, 1905, in the case of France *v.* Great Britain concerning the Muscat Dhows; see Martens, N.R.G. 2nd Ser. XXXV. (1908), p. 356.

(5) On May 22, 1909, in the case of France *v.* Germany concerning the Casa Blanca incident; see Martens, N.R.G. 3rd Ser. II. (1910), p. 19.

¹ The procedure to be followed by and before the Tribunal is described below, vol. II. § 27.

(6) On October 23, 1909, in the case of *Norway v. Sweden* concerning the question of their maritime frontier ; see Martens, N.R.G. 3rd Ser. III. (1910), p. 85.

(7) On September 7, 1910, in the case of the *United States of America v. Great Britain* concerning the North Atlantic Fisheries ; see Martens, N.R.G. 3rd Ser. IV. (1911), p. 89.

(8) On October 25, 1910, in the case of the *United States of America v. Venezuela* concerning the claims of the Orinoco Steamship Co. ; see Martens, N.R.G. 3rd Ser. IV. (1911), p. 79.

(9) On February 24, 1911, in the case of *France v. Great Britain* concerning the *British-Indian Savarkar* ; see Martens, N.R.G. 3rd Ser. IV. (1911), p. 744.

VII

THE INTERNATIONAL PRIZE COURT AND THE PROPOSED INTERNATIONAL COURT OF JUSTICE

Lawrence, § 192—Despagnet, No. 683 ^{bis}—Scott, "The Hague Peace Conferences" (1909), pp. 465–511 and 423–464, and in A.J. V. (1911), pp. 302–324—Gregory in A.J. II. (1908), pp. 458–475.

The Inter-
national
Prize
Court.

§ 476a. The International Prize Court will be established at the Hague according to Convention XII. of the second Hague Peace Conference of 1907. The following are the more important stipulations of this Convention concerning the constitution ¹ of the Court :—
The Court consists of fifteen judges and fifteen deputy judges, who are appointed for a period of six years and who rank equally and have precedence according to the date of the notification of their appointment, but the deputy judges rank after the judges (articles 10 to 12). Of the fifteen judges of which the Court is composed, nine constitute a quorum ; a judge who is absent or prevented from sitting is replaced by his deputy judge (article 14). The judges enjoy diplomatic privileges and immunities in the performance of their duties

¹ Details concerning the constitution of the International Prize Court and the mode of procedure to be

followed by and before it, will be given below, vol. II. part III. chapter VI.

when outside their own country (article 13). Each contracting Power appoints one judge and one deputy judge, and the judges appointed by Great Britain, Germany, the United States of America, Austria-Hungary, France, Italy, Japan, and Russia are always summoned to sit, whereas the judges appointed by the other contracting Powers sit by rota, as shown in the table annexed to the Convention (article 15). If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it shall take part in the settlement of all cases arising from the war; lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw, and this arrangement does not affect the judge appointed by the other belligerent (article 16). No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts, or has taken part in the case as counsel or advocate for one of the parties; no judge or deputy judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever (article 17). The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision; a neutral Power, which is a party to the proceedings or whose national is a party, has the same right of appointment; if in applying this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed (article 18). The Court elects its President and Vice-President by an absolute majority of the votes cast; after two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot (article 19). The judges of the International Prize Court are entitled to travelling allowances in accordance with the regulations in force

in their own country, and in addition thereto receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem; the judges may not receive from their own Governments or from that of any other Power any remuneration in their capacity of members of the Court (article 20). The seat of the International Prize Court is at the Hague, and it cannot, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents (article 21).

The proposed
International
Court of
Justice.

§ 476b. Valuable as is the Permanent Court of Arbitration at the Hague, it must be pointed out that it is not a real Court of Justice. For, firstly, it is not itself a deciding tribunal, but only a list of names out of which the parties in each case elect some members and thereby constitute the Court. Secondly, experience teaches that a Court of Arbitration endeavours more to give an award *ex aequo et bono* which more or less pleases both parties than to decide the conflict in a judicial manner by simply applying strict legal rules without any consideration as to whether or no the decision will please either party. Thirdly, since in conflicts to be decided by arbitration the arbitrators each time are selected by the parties, there are in most cases different individuals acting as arbitrators, so that there is no continuity in the administration of justice.

For these reasons it would be of the greatest value to institute side by side with the Permanent Court of Arbitration a real International Court of Justice consisting of a number of judges in the technical sense of the term, who are once for all appointed and will have to act in each case that the parties choose to bring before the Court. Such a Court would only take the legal aspects of the case into consideration and would base its decision on mere legal deliberations. It would secure continuity in the administration of international

justice, because it would in each case consider itself bound by its former decisions. It would in time build up a valuable practice by deciding innumerable controversies which as yet haunt the theory of International Law. The second Hague Peace Conference of 1907 therefore discussed the question of creating such a Court, but only produced the draft of a Convention concerning the subject. It is, however, to be regretted that this draft Convention speaks of the creation of a judicial "Arbitration" Court, and thereby obliterates the boundary line between the arbitral and the strictly judicial decision of international disputes; it would have been better to speak simply of an International Court of Justice. However that may be, there is no doubt that the near future will bring the establishment of such a Court of Justice in contradistinction to the Permanent Court of Arbitration, for the parties to a conflict frequently hesitate to have it settled by arbitration, whereas they would be glad to have it settled by a strictly judicial decision of the legal questions involved. The same motives which urged the Powers to leave aside the Permanent Court of Arbitration in Prize Cases and to enter into a Convention for the establishment of a real International Prize Court, will in time compel the Powers to establish a real International Court of Justice.¹

¹ It should be mentioned that Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador in 1907—see Supplement to the *American Journal of International Law*, II. (1908), p. 281—established the "Central American Court of Justice" at Cartago, consisting of five judges, to which they have bound them-

selves to submit all controversies arising amongst them, of whatsoever nature, no matter what the origin may be, in case they cannot be settled by diplomatic negotiation. This Court is, however, only of local importance, although it is of great value, being the first Court of its kind.

PART IV

INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

NEGOTIATION

Heffter, §§ 234–239—Geffcken in Holtzendorff, III. pp. 668–676—Liszt, § 20—Ullmann, § 71—Bonfilis, Nos. 792–795—Pradier-Fodéré, III. Nos. 1354–1362—Rivier, II. § 45—Calvo, III. §§ 1316–1320, 1670–1673.

§ 477. International negotiation is the term for such intercourse between two or more States as is initiated and directed for the purpose of effecting an understanding between them on matters of interest. Since civilised States form a body interknitted through their interests, such negotiation is in some shape or other constantly going on. No State of any importance can abstain from it in practice. There are many other international transactions,¹ but negotiation is by far the most important of them. And it must be emphasised that negotiation as a means of amicably settling conflicts between two or more States is only a particular kind of negotiation, although it will be specially discussed in another part of this work.²

Concep-
tion of
Negotia-
tion.

§ 478. International negotiations can be conducted by all such States as have a standing within the Family of Nations. Full-Sovereign States are, therefore, the regular subjects of international negotiation. But it would be wrong to maintain that half- and part-Sovereign States can never be parties to international negotiations. For they can indeed conduct negotiations on

Parties to
Negotia-
tion.

¹ See below, §§ 486–490.

² See below, vol. II. §§ 4–6.

those points concerning which they have a standing within the Family of Nations. Thus, for instance, while Bulgaria was a half-Sovereign State, she was nevertheless able to negotiate on several matters with foreign States independently of Turkey.¹ But so-called colonial States, as the Dominion of Canada, can never be parties to international negotiations; any necessary negotiation for a colonial State must be conducted by the mother-State to which it internationally belongs.²

It must be specially mentioned that such negotiation as is conducted between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, negotiations of a State with the Pope and the Holy See are not international negotiations, although all the formalities connected with international negotiations are usually observed in this case. Thus, too, negotiations on the part of States with a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not international negotiations.

Purpose of
Negotia-
tion.

§ 479. Negotiations between States may have various purposes. The purpose may be an exchange of views only on some political question; but it may also be an arrangement as to the line of action to be taken in future with regard to a certain point, or a settlement of differences, or the creation of international institutions, such as the Universal Postal Union for example, and so on. Of the greatest importance are those negotiations which aim at an understanding between members of the Family of Nations respecting the very creation of rules of International Law by inter-

¹ See above, § 91.

² The demand on the part of many influential Canadian politicians, expressed after the verdict of the Arbitration Court in the Alaska Boundary dispute, that

Canada should have the power of making treaties independently of Great Britain, necessarily includes the demand to become in some respects a Sovereign State.

national conventions. Since the Vienna Congress at the beginning of the nineteenth century negotiations between the Powers for the purpose of defining, creating, or abolishing rules of International Law have been frequently and very successfully conducted.¹

§ 480. International negotiations are conducted by the agents which represent the negotiating States. The heads of these States may conduct the negotiations in person, either by letters or by a personal interview. Serious negotiations have in the past been conducted by heads of States, and, although this is comparatively seldom done, there is no reason to believe that personal negotiations between heads of States will not occur in future.² Heads of States may also personally negotiate with diplomatic or other agents commissioned for that purpose by other States. Ambassadors, as diplomatic agents of the first class, must, according to International Law, have even the right to approach in person the head of the State to which they are accredited for the purpose of negotiation.³ The rule is, however, that negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help either of their diplomatic envoys or of agents without diplomatic character and so-called commissaries.⁴

§ 481. The Law of Nations does not prescribe any particular form in which international negotiations must be conducted. Such negotiations may, therefore, take place *viva voce* or through the exchange of written representations and arguments, or both. The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be

¹ See below, §§ 555–568b.

² See below, § 495.

³ See above, § 385.

⁴ Negotiations between armed

forces of belligerents are regularly conducted by soldiers. See below, vol. II. §§ 220–240.

avoided, which easily arise during *viva voce* negotiations. Of the greatest importance are the negotiations which take place through congresses and conferences.¹

During *viva voce* negotiations it happens sometimes that a diplomatic envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State. In such case it is usual to leave a copy of the letter at the Foreign Office. If a copy is refused, the Secretary for Foreign Affairs can on his part refuse to hear the letter read. Thus in 1825 Canning refused to allow a Russian communication to be read to him by the Russian Ambassador in London with regard to the independence of the former Spanish colonies in South America, because this Ambassador was not authorised to leave a copy of the communication at the British Foreign Office.²

End and
Effect of
Negotia-
tion.

§ 482. Negotiations may and often do come to an end without any effect whatever on account of the parties failing to agree. On the other hand, if negotiations lead to an understanding, the effect may be two-fold. It may consist either in a satisfactory exchange of views and intentions, and the parties are then in no way, at any rate not legally, bound to abide by such views and intentions, or to act on them in the future; or in an agreement on a treaty, and then the parties are legally bound by the stipulations of such treaty. Treaties are of such importance that it is necessary to discuss them in a special chapter.³

¹ See below, § 483.

² See below, §§ 491–554.

³ As regards the language used during negotiation, see above, § 359.

II

CONGRESSES AND CONFERENCES

Phillimore, II. §§ 39-40—Twiss, II. § 8—Taylor, §§ 34-36—Bluntschli, § 12—Heffter, § 242—Geffcken in Holtzendorff, III. pp. 679-684—Ullmann, §§ 71-72—Bonfils, Nos. 796-814—Despagnet, Nos. 478-482—Pradier-Fodéré, VI. Nos. 2593-2599—Rivier, II. § 46—Nys, III. pp. 7-17—Calvo, III. §§ 1674-1681—Fiore, II. Nos. 1216-1224, and Code, Nos. 1206-1245—Martens, I. § 52—Charles de Martens, "Guide diplomatique," vol. I. § 58—Pradier-Fodéré, "Cours de droit diplomatique" (1881), vol. II. pp. 372-424—Zaleski, "Die völkerrechtliche Bedeutung der Congresse" (1874)—Nippold, "Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten" (1907), pp. 480-526.

§ 483. International congresses and conferences are formal meetings of the representatives of several States for the purpose of discussing matters of international interest and coming to an agreement concerning these matters. As far as language is concerned, the term "congress" as well as "conference" may be used for the meetings of the representatives of only two States, but as a rule congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States. Several writers¹ allege that there are characteristic differences between a congress and a conference. But all such alleged differences vanish in face of the fact that the Powers, when summoning a meeting of representatives, name such body either congress or conference indiscriminately. It is not even correct to say that the more important meetings are named congresses, in contradistinction to conferences, for the Hague Peace Conferences of 1899 and 1907 were, in spite of their grand importance, denominated conferences.

Concep-
tion of
Con-
gresses
and Con-
ferences.

Much more important than the mere terminological difference between congress and conference is the difference of the representatives who attend the meeting.

¹ See, for instance, Martens, I. § 52; Fiore, II. §§ 1216-1224, and Code, No. 1231.

For it may be that the heads of the States meet at a congress or conference, or that the representatives consist of diplomatic envoys and Secretaries for Foreign Affairs of the Powers. But, although congresses and conferences of heads of States have been held in the past and might at any moment be held again in the future, there can be no doubt that the most important matters are treated by congresses and conferences consisting of diplomatic representatives of the Powers.

Parties to
Con-
gresses
and Con-
ferences.

§ 484. Congresses and conferences not being organised by customary or conventional International Law, no rules exist with regard to the parties of a congress or conference. Everything depends upon the purpose for which a congress or a conference meets, and upon the Power which invites other Powers to the meeting. If it is intended to settle certain differences, it is reasonable that all the States concerned should be represented, for a Power which is not represented need not consent to the resolutions of the congress. If the creation of new rules of International Law is intended, at least all full-Sovereign members of the Family of Nations ought to be represented. To the First Peace Conference at the Hague, nevertheless, only the majority of States were invited to send representatives, the South American Republics not being invited at all. But to the Second Peace Conference of 1907 forty-seven States were invited, although only forty-four sent representatives. Costa Rica, Honduras, and Abyssinia were invited, but did not send any delegates.

It is frequently maintained that only full-Sovereign States can be parties to congresses and conferences. This is certainly not correct, as here, too, everything depends upon the merits of the special case. As a rule, full-Sovereign States only are parties, but there are exceptions. Thus, Bulgaria, at the time a vassal under Turkish suzerainty, was a party to the First as

well as to the Second Hague Peace Conference, although without a vote. There is no reason to deny the rule that half- and part-Sovereign States can be parties to congresses and conferences in so far as they are able to negotiate internationally.¹ Such States are, in fact, frequently asked to send representatives to such congresses and conferences as meet for non-political matters.

But no State can be a party which has not been invited, or admitted at its own request. If a Power thinks it fitting that a congress or conference should meet, it invites such other Powers as it pleases. The invited Powers may accept under the condition that certain other Powers should or should not be invited or admitted. Those Powers which have accepted the invitation become parties if they send representatives. Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates.

§ 485. After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet and constitute themselves by exchanging their commissions and electing a president and other officers. It is usual, but not obligatory,² for the Secretary for Foreign Affairs of the State within which the congress meets to be elected president. If the difficulty of the questions on the programme makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress. In such discussion all representatives can take part. After the discussion follows the voting. The motion must be carried unanimously to consummate the task of the congress, for the vote of the majority has no

Procedure
at Con-
gresses
and Con-
ferences.

¹ See above, § 478.

² Thus at both Hague Peace

Conferences the first Russian delegate was elected president.

power whatever in regard to the dissenting parties. But it is possible that the majority considers the motion binding for its members. A protocol is to be kept of all the discussions and the voting. If the discussions and votings lead to a final result upon which the parties agree, all the points agreed upon are drawn up in an Act, which is signed by the representatives and which is called the Final Act or the General Act of the congress or conference. A party can make a declaration or a reservation in signing the Act for the purpose of excluding a certain interpretation of the Act in the future. And the Act may expressly stipulate freedom for States which were not parties to accede to it in future.

III

TRANSACTIONS BESIDES NEGOTIATION

Bluntschli, § 84—Hartmann, § 91 ; Gareis, § 77—Liszt, § 20.

Different
kinds of
Transac-
tion.

§ 486. International transaction is the term for every act on the part of a State in its intercourse with other States. Besides negotiation, which has been discussed above in §§ 477–482, there are eleven other kinds of international transactions which are of legal importance—namely, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war, and subjugation. Recognition has already been discussed above in §§ 71–75, as has also intervention in §§ 134–138, and, further, subjugation in §§ 236–241. Retorsion, reprisals, pacific blockade, and war will be treated in the second volume of this work. There are, therefore, here to be discussed only the remaining four transactions—namely, declaration, notification, protest, and renunciation.

Declara-
tion.

§ 487. The term “declaration” is used in three

different meanings. It is, first, sometimes used as the title of a body of stipulations of a treaty according to which the parties engage themselves to pursue in future a certain line of conduct. The Declaration of Paris, 1856, the Declaration of St. Petersburg, 1868, and the Declaration of London, 1909, are instances of this. Declarations of this kind differ in no respect from treaties.¹ One speaks, secondly, of declarations when States communicate to other States or *urbi et orbi* an explanation and justification of a line of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters. Declarations of this kind may be very important, but they hardly comprise transactions out of which rights and duties of other States follow. But there is a third kind of declarations out of which rights and duties do follow for other States, and it is this kind which comprises a specific international transaction, although the different declarations belonging to this group are by no means of a uniform character. Declarations of this kind are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others.

§ 488. Notification is the technical term for the communication to other States of the knowledge of certain facts and events of legal importance. But a distinction must be drawn between obligatory and merely usual notification.

Notification has of late been stipulated in several cases to be obligatory. Thus, according to article 34 of the General Act of the Berlin Congo Conference of 1885, notification of new occupations and the like on the

¹ See below, § 508, where is mentioned the attempt of the British Foreign Office to give to the

term "declaration" a specific meaning.

Notification.

African coast is obligatory. Thus, further, according to article 84 of the Hague Convention for the peaceful adjustment of international differences, in case a number of States are parties to a treaty and two of the parties are at variance concerning the interpretation of such treaty and agree to have the difference settled by arbitration, they have to notify this agreement to all other parties to the treaty. Again, according to article 2 of the Hague Convention concerning the Commencement of Hostilities, 1907, the outbreak of war must be notified to the neutral Powers, and so must the declaration of a blockade,¹ according to article 11 of the Declaration of London, 1909.

Apart from such cases in which notification is stipulated as obligatory, it is in principle not obligatory, although in fact it frequently takes place because States cannot be considered subject to certain duties without the knowledge of the facts and events which give rise to these duties. Thus it is usual to notify to other States changes in the headship and in the form of government of a State, the establishment of a Federal State, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like.

Protest.

§ 489. Protest is a formal communication on the part of a State to another that it objects to an act performed or contemplated by the latter. A protest serves the purpose of preservation of rights, or of making it known that the protesting State does not acquiesce in and does not recognise certain acts. A protest can be lodged with another State concerning acts of the latter which have been notified to the former or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal and against its rights, and nevertheless does not protest, such attitude im-

¹ See also Declaration of London, articles 11 (2), 16, 23, 25, and 26.

plies renunciation of such rights, provided a protest would have been necessary to preserve a claim. It may further happen that a State at first protests, but afterwards either expressly¹ or tacitly acquiesces in the act. And it must be emphasised that under certain circumstances and conditions a simple protest on the part of a State without further action is not in itself sufficient to preserve the rights in behalf of which the protest was made.²

§ 490. Renunciation is the deliberate abandonment of rights. It can be given *expressis verbis* or tacitly. If, for instance, a State by occupation takes possession of an island which has previously been occupied by another State,³ the latter tacitly renounces its rights by not protesting as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement. But it must be specially observed that mere silence on the part of a State does not imply renunciation; this occurs only when a State remains silent, although a protest is necessary to preserve a claim.

Renuncia-
tion.

¹ Thus by section 2 of the Declaration concerning Siam, Madagascar, and the New Hebrides, which is embodied in the Anglo-French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the Customs tariff estab-

lished at Madagascar after the annexation to France.

² See below, § 539, concerning the withdrawal of Russia from article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

³ See above, § 247.

CHAPTER II

TREATIES

I

CHARACTER AND FUNCTION OF TREATIES

Vattel, II. §§ 152, 153, 157, 163—Hall, § 107—Phillimore, II. § 44—Twiss, I. §§ 224–233—Taylor, §§ 341–342—Bluntschli, § 402—Heffter, § 81—Despagnet, Nos. 435–436—Pradier-Fodéré, II. Nos. 888–919—Rivier, II. pp. 33–40—Nys, III. pp. 18–20 and 43–48—Calvo, III. §§ 1567–1584—Fiore, II. Nos. 976–982—Martens, I. § 103—Bergbohm, “Staatsverträge und Gesetze als Quellen des Völkerrechts” (1877)—Jellinek, “Die rechtliche Natur der Staatenverträge” (1880)—Laghi, “Teoria dei trattati internazionali” (1882)—Buonamici, “Dei trattati internazionali” (1888)—Nippold, “Der völkerrechtliche Vertrag” (1894)—Triepel, “Völkerrecht und Landesrecht” (1899), pp. 27–90.

Concep-
tion of
Treaties.

§ 491. International treaties are conventions or contracts between two or more States concerning various matters of interest. Even before a Law of Nations in the modern sense of the term was in existence, treaties used to be concluded between States. And although in those times treaties were neither based on nor were themselves a cause of an International Law, they were nevertheless considered sacred and binding on account of religious and moral sentiment. However, since the manifold intercourse of modern times did not then exist between the different States, treaties did not discharge such all-important functions in the life of humanity as they do now.

Different
kinds of
Treaties.

§ 492. These important functions are manifest if attention is given to the variety of international treaties which exist nowadays and are day by day concluded for innumerable purposes. In regard to State property,

treaties are concluded of cession, of boundary, and many others. Alliances, treaties of protection, of guarantee, of neutrality, and of peace are concluded for political purposes. Various purposes are served by consular treaties, commercial¹ treaties, treaties in regard to the post, telegraphs, and railways, treaties of copyright and the like, of jurisdiction, of extradition, monetary treaties, treaties in regard to measures and weights, to rates, taxes, and custom-house duties, treaties on the matter of sanitation with respect to epidemics, treaties in the interest of industrial labourers, and treaties with regard to agriculture and industry. Again, various purposes are served by treaties concerning warfare, mediation, arbitration, and so on.

I do not intend to discuss the question of classification of the different kinds of treaties, for hitherto all attempts² at such classification have failed. But there is one distinction to be made which is of the greatest importance and according to which the whole body of treaties is to be divided into two classes. For treaties may, on the one hand, be concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed law-making treaties. On the other hand, treaties may be concluded for all kinds of other purposes. Law-making treaties as a source of rules of International Law have been discussed above (§ 18); the most important of these treaties will be considered below (§§ 556–568b).

§ 493. The question as to the reason of the binding force of international treaties always was, and still is, Binding
Force of
Treaties.

¹ See below, §§ 578–580.

² Since the time of Grotius the science of the Law of Nations has not ceased attempting a satisfactory classification of the different kinds of treaties. See Heffter, §§ 88–91;

Bluntschli, §§ 442–445; Martens, I. § 113; Ullmann, § 82; Wheaton, § 268 (following Vattel, II. § 169); Rivier, II. pp. 106–118; Westlake, I. p. 283, and many others.

very much disputed. That all those publicists who deny the legal character of the Law of Nations deny likewise a legally binding force in international treaties is obvious. But even among those who acknowledge the legal character of International Law, unanimity by no means exists concerning this binding force of treaties. The question is all the more important as everybody knows that treaties are sometimes broken, rightly according to the opinion of the one party, and wrongly according to the opinion of the other. Many publicists find the binding force of treaties in the Law of Nature, others in religious and moral principles, others¹ again in the self-restraint exercised by States in becoming a party to a treaty. Some writers² assert that it is the contracting parties' own will which gives binding force to their treaties, and others³ teach that such binding force is to be found *im Rechtsbewusstsein der Menschheit*—that is, in the idea of right innate in man. I believe that the question can satisfactorily be dealt with only by dividing it into several different questions and by answering those questions *seriatim*.

First, the question is to be answered why treaties are legally binding. The answer must categorically be that this is so because there exists a customary rule of International Law that treaties are binding.

Then the question might be put as to the cause of the existence of such customary rule. The answer must be that such rule is the product of several joint causes. Religious and moral reasons require such a rule quite as much as the interest of the States, for no law could exist between nations if such rule did not exist. All causes which have been and are still working to create and maintain an International Law are at the background of this question.

¹ So Hall, § 107; Jellinek, "Staatenverträge," p. 31; Nippold, § 11.

² So Triepel, "Völkerrecht und Landesrecht" (1899), p. 82.

³ So Bluntschli, § 410.

And, thirdly, the question might be put how it is possible to speak of a legally binding force in treaties without a judicial authority to enforce their stipulations. The answer must be that the binding force of treaties, although it is a legal force, is not the same as the binding force of contracts according to Municipal Law, since International Law is a weaker law, and for this reason less enforceable, than Municipal Law. But just as International Law does not lack legal character in consequence of the fact that there is no central authority¹ above the States which could enforce it, so international treaties are not deficient of a legally binding force because there is no judicial authority for the enforcement of their stipulations.

II

PARTIES TO TREATIES

Vattel, II. §§ 154–156, 206–212—Hall, § 108—Westlake, I. p. 279—Phillimore, II. §§ 48–49—Halleck, I. pp. 275–278—Taylor, §§ 361–365—Wheaton, §§ 265–267—Moore, V. §§ 734–737—Bluntschli, §§ 403–409—Heffter, §§ 84–85—Ullmann, § 75—Bonfils, No. 818—Despagnet, No. 446—Pradier-Fodéré, II. Nos. 1058–1068—Rivier, II. pp. 45–48—Nys, III. pp. 20–24—Calvo, III. §§ 1616–1618—Fiore, II. Nos. 984–1000, and Code, Nos. 743–749—Martens, I. § 104—Nippold, op. cit. pp. 104–112—Schoen in Z.V. V. (1911), pp. 400–431.

§ 494. The so-called right of making treaties is not a right of a State in the technical meaning of the term, but a mere competence attaching to sovereignty. A State possesses, therefore, treating-making power only so far as it is sovereign. Full-Sovereign States may become parties to treaties of all kinds, being regularly competent to make treaties on whatever matters they please. Not-full Sovereign States, however, can become parties to such treaties only according to their competence to conclude. It is impossible to lay down

The
Treaty-
making
Power.

¹ See above, § 5.

a hard-and-fast rule concerning such competence of all not-full Sovereign States. Everything depends upon the special case. Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States.¹ Thus, again, it depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States; ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like.

Treaty-
making
Power
exercised
by Heads
of States.

§ 495. (The treaty-making power of all States is exercised by their heads, either personally or through representatives appointed by these heads.) The Holy Alliance of Paris, 1815, was personally concluded by the Emperors of Austria and Russia and the King of Prussia. And when, on June 24, 1859, the Austrian army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca and agreed in person on preliminaries of peace. Yet, as a rule, heads of States do not act in person, but authorise representatives to act for them. Such representatives receive a written commission, known as powers or full powers, which authorises them to negotiate in the name of the respective heads of States. They also receive oral or written, open or secret instructions. But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are

¹ According to articles 7 and 9 of the Constitution of Switzerland the Swiss member-States are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics. According to article 11 of the Constitution of the German Empire, the German member-States are com-

petent to conclude treaties concerning all such matters as do not, in conformity with article 4 of the Constitution, belong to the competence of the Empire. On the other hand, according to article 1, section 10, of the Constitution of the United States of America, the member-States are incompetent either to conclude treaties among themselves or with foreign States.

in principle not valid before ratification.¹ If they conclude a treaty by exceeding their powers or acting contrary to their instructions, the treaty is not a real treaty and not binding upon the State they represent. A treaty of such a kind is called a *sponsio* or *sponsiones*. *Sponsiones* may become a real treaty and binding upon the State through the latter's approval.) Nowadays, however, the difference between real treaties and *sponsiones* is less important than in former times, when the custom in favour of the necessity of ratification for the validity of treaties was not yet general. If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*.

§ 496. (For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their States. Such functionaries are *ipso facto* by their offices and duties competent to enter into certain agreements without the requirement of ratification. Thus, for instance, in time of war, military and naval officers in command² can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. But it must be emphasised that treaties of this kind are valid only when these functionaries have not exceeded their powers.)

Minor
Function-
aries
exercising
Treaty-
making
Power.

§ 497. Although the heads of States are regularly, according to the Law of Nations, the organs that exercise the treaty-making power of the States, constitutional restrictions imposed upon the heads concerning the exercise of this power are nevertheless of importance for the Law of Nations. Such treaties concluded by heads of States or representatives authorised by these heads as violate constitutional restrictions are not real treaties and do not bind the State concerned, because

Con-
stitutional
Restric-
tions.

¹ See below, § 510.

² See Grotius, III. c. 22.

the representatives have exceeded their powers in concluding the treaties,¹ Such constitutional restrictions, although they are not of great importance in Great Britain,² play a prominent part in the Constitutions of most countries. Thus, according to article 8 of the French Constitution, the President exercises the treaty-making power; but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament. Thus, further, according to articles 1, 4, and 11 of the Constitution of the German Empire, the Emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce, and several other matters, are not valid without the co-operation of the Bundesrath and the Reichstag. Again, according to article 2, section 2, of the Constitution of the United States, the President can only ratify treaties with the consent of the Senate.)

Mutual
Consent of
the Con-
tracting
Parties.

§ 498. A treaty being a convention, mutual consent of the parties is necessary. Mere proposals made by one party and not accepted by the other are, therefore, not binding upon the proposer. Without force are also pollicitations which contain mere promises without acceptance by the party to whom they were made. Not binding are, lastly, so-called *punctationes*, (mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty.) But such *punctationes* must not be confounded either with a preliminary treaty or with a so-called *pactum de contrahendo*. A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty and

¹ The whole matter is discussed with great lucidity by Nippold, op. cit. pp. 127-164; see also Schoen, loc. cit.

² See Anson, "The Law and Custom of the Constitution," II. (2nd ed.), pp. 297-300.

therefore binding upon the parties. A *pactum de contrahendo* requires likewise the mutual consent of the parties. It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties. The difference between *punctationes* and a *pactum de contrahendo* is, that the latter stipulates an obligation of the parties to settle the respective points by a treaty, whereas the former does not.)

§ 499. (As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required.) It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. (The phrase "freedom of action" applies only to the *representatives* of the contracting States. It is *their* freedom of action in consenting to a treaty which must not have been interfered with) and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the party so represented.) But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such treaty) on the ground that its freedom of action was interfered with at the time.¹ This must be emphasised, because in practice such cases of repudiation have frequently occurred. A State may, of course, hold itself justified by political necessity in shaking off such obligations, but this does not alter the fact that such action is a breach of law.

Freedom
of Action
of con-
senting
Represent-
atives.

§ 500. Although a treaty was concluded with the

Delusion
and Error
in Con-

¹ See examples in Moore, V. § 742.

tracting
Parties.

real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting party. If, for instance, a boundary treaty were based upon an incorrect map or a map fraudulently altered by one of the parties, such treaty would by no means be binding. Although there is freedom of action in such cases, consent has been given under circumstances which prevent the treaty from being binding.

III

OBJECTS OF TREATIES

Vattel, II. §§ 160-162, 166—Hall, § 108—Phillimore, II. § 51—Walker, § 30—Bluntschli, §§ 410-416—Heffter, § 83—Ullmann, § 97—Bonfils, No. 819—Despagnet, No. 445—Pradier-Fodéré, II. Nos. 1080-1083—Mérignhac, II. p. 640—Rivier, II. pp. 57-63—Nys, III. p. 24—Fiore, II. Nos. 1001-1004, and Code, Nos. 755-758—Martens, I. § 110—Jellinek, "Die rechtliche Natur der Staatenverträge" (1880), pp. 59-60—Nippold, op. cit. pp. 181-190.

Objects in
general of
Treaties.

§ 501. The object of treaties is always an obligation, whether mutual between all the parties or unilateral on the part of one only. Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States. Since there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty. However, the Law of Nations prohibits some obligations from becoming objects of treaties, so that such treaties as comprise obligations of this kind are from the very beginning null and void.¹

Obliga-
tions of
Contract-
ing Parties
only can
be Object.

§ 502. Obligations to be performed by a State other than a contracting party cannot be the object of a

¹ The voidance *ab origine* of these treaties must not be confounded with voidance of such treaties as are

valid in their inception, but become afterwards void on some ground or other; see below, §§ 541-544.

treaty. A treaty stipulating such an obligation would be null and void. But this must not be confounded with the obligation undertaken by one of the contracting States to exercise an influence upon another State to perform certain acts.) The object of a treaty with such a stipulation is an obligation of one of the contracting States, and the treaty is therefore valid and binding.

§ 503. Such obligation as is inconsistent with obligations under treaties previously concluded by one State with another cannot be the object of a treaty with a third State. Thus, in 1878, when after the war Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, England protested,¹ and the Powers met at the Congress of Berlin to arrange matters by mutual consent.

An Obligation inconsistent with other Obligations cannot be an Object.

§ 504. An obligation to perform a physical impossibility² cannot be the object of a treaty. If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void.

Object must be physically possible.

§ 505. It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty. Thus, an alliance for the purpose of attacking a third State without provocation is from the beginning not binding. It cannot be denied that in the past many treaties stipulating immoral obligations have been concluded and executed, but this does not alter the fact that such treaties were legally not binding upon the contracting parties. It must, however, be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by other

Immoral Obligations.

¹ See Martens, N.R.G. 2nd Ser. III. p. 257.

² See below, § 542.

States may not necessarily appear immoral to the contracting parties, and there is no Court that can decide the controversy.)

Illegal
Obligations.

§ 506. It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the Open Sea, or should command its vessels to commit piratical acts on the Open Sea, such treaty would be null and void, because it is a principle of International Law that no part of the Open Sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the High Seas.

IV

FORM AND PARTS OF TREATIES

Grotius, II. c. 15, § 5—Vattel, II. § 153—Hall, § 109—Westlake, I. pp. 279—281—Wheaton, § 253—Moore, V. § 740—Bluntschli, §§ 417—427—Hartmann, §§ 46—47—Heffter, §§ 87—91—Ullmann, § 80—Bonfil, Nos. 821—823—Pradier-Fodéré, II. Nos. 1084—1099—Mérignhac, II. p. 645—Rivier, II. pp. 64—68—Nys, III. pp. 25—28—Fiore, II. Nos. 1004—1006, and Code, Nos. 759—763—Martens, I. § 112—Jellinek, "Die rechtliche Natur der Staatenverträge" (1880), p. 56—Nippold, op. cit. pp. 178—181.

No necessary
Form
of
Treaties.

§ 507. The Law of Nations includes no rule which prescribes a necessary form of treaties.) A treaty is, therefore, concluded as soon as the mutual consent of the parties becomes clearly apparent. Such consent must always be given expressly, for a treaty cannot be concluded by tacit consent. But it matters not whether an agreement is made in writing, orally, or by symbols. Thus, in time of war, the exhibition of a white flag symbolises the proposal of an agreement as to a brief truce for the purpose of certain negotia-

tions, and the acceptance of the proposal on the part of the other side by the exhibition of a similar symbol establishes a convention as binding as any written treaty. Thus, too, history tells of an oral treaty of alliance, secured by an oath, concluded in 1697 at Pillau between Peter the Great of Russia and Frederick III., Elector of Brandenburg.¹ Again, treaties are sometimes concluded through an exchange of diplomatic notes between the Secretaries for Foreign Affairs of two States or through the exchange of personal letters between the heads of two States. However, as a matter of reason, treaties usually take the form of a written² document signed by duly authorised representatives of the contracting parties.

§ 508. (International compacts which take the form of written contracts, are, besides *Agreements* or *Treaties*, sometimes termed *Acts*, sometimes *Conventions*, sometimes *Declarations*. But there is no essential difference between them, and their binding force upon the contracting parties is the same whatever be their name.) The Geneva Convention, the Declarations of Paris and of London, and the Final Act of the Vienna Congress are as binding as any agreement which goes under the name of "Treaty" or "Convention." The attempt³ to distinguish fundamentally between a "Declaration" and a "Convention" by maintaining that whereas a "Convention" creates rules of particular International Law between the contracting States only, a "Declaration" contains the recognition, on the part of the best qualified and most interested Powers, of rules of uni-

Acts, Con-
ventions,
Declara-
tions.

¹ See Martens, I. § 112.

² The only writer who nowadays insists upon a *written* agreement for a treaty to be valid is, as far as I know, Bulmerincq (§ 56). But although all important treaties are naturally concluded in writing, the example of the agreements concluded between armed forces in time of war

either orally or through symbols proves that the written form is not absolutely necessary.

³ On the part of the British Foreign Office, see Parliamentary Papers, Miscellaneous, No. 5 (1909), Cd. 4555, Proceedings of the International Naval Conference held in London, December 1908–1909, p. 57.

versal International Law, does not stand the test of scientific criticism. A "Declaration" is nothing else but the title of a law-making treaty according to which the parties engage themselves to pursue in future a certain line of conduct.¹ But such law-making treaties are quite as frequently styled "Conventions" as "Declarations." The best example is the Hague "Convention" concerning the laws and usages of war, which is based upon the unratified "Declaration" concerning the laws and customs of war produced by the Brussels Conference of 1874.

Parts of
Treaties.

§ 509. Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties. But the following order is usually observed. A first part, the so-called *preamble*, comprises the names of the heads of the contracting States, of their duly authorised representatives, and the motives for the conclusion of the treaty. A second part consists of the primary stipulations in numbered articles. A third part consists of miscellaneous stipulations concerning the duration of the treaty, its ratification, the accession of third Powers, and the like. The last part comprises the signatures of the representatives. But this order is by no means necessary. Sometimes, for instance, the treaty itself does not contain the very stipulations upon which the contracting parties have agreed, such stipulations being placed in an annex to the treaty. It may also happen that a treaty contains secret stipulations in an additional part, which are not made public with the bulk of the stipulations.²

¹ See above, § 487.

details by Pradier-Fodéré, II. §§

² The matter is treated with all 1086-1096.

V

RATIFICATION OF TREATIES

Grotius, II. c. 11, § 12—Pufendorf, III. c. 9, § 2—Vattel, II. § 156—Hall, § 110—Westlake, I. pp. 279–280—Lawrence, § 132—Phillimore, II. § 52—Twiss, I. § 214—Halleck, I. pp. 276–277—Taylor, §§ 364–367—Moore, V. §§ 743–756—Walker, § 30—Wharton, II. §§ 131–131A—Wheaton, §§ 256–263—Bluntschli, §§ 420–421—Heffter, § 87—Gessner in Holtzendorff, III. pp. 15–18—Ullmann, § 78—Bonfils, Nos. 824–831—Pradier-Fodéré, II. Nos. 1100–1119—Mérignhao, II. pp. 652–666—Nys, III. pp. 28–36—Rivier, II. § 50—Calvo, III. §§ 1627–1636—Fiore, II. No. 994, and Code, No. 750—Martens, I. §§ 105–108—Wicquefort, “*L’Ambassadeur et ses fonctions*” (1680), II. Section XV.—Jellinek, “*Die rechtliche Natur der Staatenverträge*” (1880), pp. 53–56—Nippold, *op. cit.* pp. 123–125—Wegmann, “*Die Ratifikation von Staatsverträgen*” (1892).

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is as a rule suspended till ratification is given. The function of ratification is, therefore, to make the treaty binding, and, if it is refused, the treaty falls to the ground in consequence. As long as ratification is not given, the treaty is, although concluded, not perfect. Many writers¹ maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent and really concludes the treaty. Before ratification, they maintain, there is no treaty concluded, but a mere mutual proposal agreed to to conclude a treaty. But this opinion does not accord with the real facts.² For the representatives are authorised and intend to conclude a treaty by their signatures. The contracting States have always taken the standpoint that a treaty is concluded as soon as their mutual consent is clearly apparent. They have always made a distinction between their consent given by representatives and their ratification to be given

Concep-
tion and
Function
of Ratifi-
cation.

¹ See, for instance, Ullmann, § 78; Jellinek, p. 55; Nippold, p. 123; Wegmann, p. 11. ² The matter is very ably discussed by Rivier, II. pp 74–76.

afterwards, they have never dreamt of confounding the two and considering their ratification their consent. It is for that reason that a treaty cannot be ratified in part, that no alterations of the treaty are possible through the act of ratification, that a treaty may be tacitly ratified by its execution, that a treaty always is dated from the day when it was duly signed by the representatives and not from the day of its ratification, that there is no essential difference between such treaties as want and such as do not want ratification.

Rationale
for the
Institu-
tion of
Ratifica-
tion.

§ 511. The rationale for the institution of ratification is another argument for the contention that the conclusion of the treaty by the representatives is to be distinguished from the confirmation given by the respective States through ratification. The reason is that States want to have an opportunity of re-examining not the single stipulations, but the whole effect of the treaty upon their interests. These interests may be of various kinds. They may (undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light) from that in which they appear to the Governments, so that the latter want to reconsider the matter. Another reason is that (treaties on many important matters are, according to the Constitutional Law of most States, not valid without some kind of consent of Parliaments. Governments must therefore have an opportunity of withdrawing from a treaty in case Parliaments refuse their recognition. These two reasons have made, and still make, the institution of ratification a necessity for International Law.

Ratifica-
tion regu-
larly, but
not abso-
lutely,
necessary.

§ 512. But ratification, although necessary in principle, is not always essential. Although it is now a universally recognised customary rule of International Law that treaties are regularly in need of ratification, even if the latter was not expressly stipulated, there

are exceptions to the rule. For treaties concluded by such State functionaries¹ as have within certain narrow limits, *ipso facto* by their office, the power to exercise the treaty-making competence of their State do not want ratification, but are binding at once when they are concluded, provided the respective functionaries have not exceeded their powers. Further, treaties concluded by heads of States in person do not want ratification provided that they do not concern matters in regard to which constitutional restrictions² are imposed upon heads of States. And, lastly, it may happen that the contracting parties stipulate expressly, for the sake of a speedy execution of a treaty, that it shall be binding at once without ratifications being necessary. Thus, the Treaty of London of July 15, 1840, between Great Britain, Austria, Russia, Prussia, and Turkey concerning the pacification of the Turko-Egyptian conflict was accompanied by a secret protocol,³ signed by the representatives of the parties, according to which the treaty was at once, without being ratified, to be executed. For the Powers were, on account of the victories of Mehemet Ali, very anxious to settle the conflict as quickly as possible. But it must be emphasised that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation. If the representatives have not received a special authorisation to dispense with ratification, then renunciation is not binding upon the States which they represent.

§ 513. No rule of International Law prescribes the length of time within which ratification must be given or refused. If such length of time is not specially stipulated by the contracting parties in the very treaty, a reasonable length of time must be presumed as mutually

Length of
Time for
Ratifica-
tion.

¹ See above, § 496.

² See above, § 497.

³ See Martens, N.R.G. I. p. 163.

granted. Without doubt, a refusal to ratify must be presumed from the lapse of an unreasonable time without ratification having been made. In most cases, however, treaties which are in need of ratification contain nowadays a clause stipulating the reservation of ratification, and at the same time a length of time within which ratification should take place.

Refusal of
Ratifica-
tion.

§ 514. The question now requires attention whether ratification can be refused on just grounds only or according to discretion. Formerly¹ it was maintained that ratification could not be refused in case the representatives had not exceeded their powers or violated their secret instructions. But nowadays there is probably no publicist who maintains that a State is in any case *legally*² bound not to refuse ratification. Yet many insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. I cannot see, however, the value of such a moral in contradistinction to a legal duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A State refusing ratification will always have reasons for such line of action which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given or withheld at discretion. But in the majority of cases, of course, ratification is not refused. A State which often and apparently wantonly refused ratification of treaties would lose all credit in international negotiations and would soon feel the consequences. On the other hand, it is impossible

¹ See Grotius, II. c. 11, § 12; Bynkershoek, "Quaestiones juris publici," II. 7; Wicquefort, "L'Ambassadeur," II. 15; Vattel, II. § 156; G. F. von Martens, § 48.

² This must be maintained in spite of Wegmann's (p. 32) assertion that a customary rule of the Law of Nations has to be recognised that

ratification can not regularly be refused. The hair-splitting scholasticism of this writer is illustrated by a comparison between his customary rule for the non-refusal of ratification as arbitrarily constructed by himself, and the opinion which he (p. 11) emphatically defends that a treaty is concluded only by ratification.

to lay down hard-and-fast rules respecting just and unjust causes of refusal of ratification. The interests at stake are so various, and the circumstances which must influence a State are so imponderable, that it must be left to the discretion of every State to decide the question for itself. Numerous examples of important treaties which have not found ratification can be given. It suffices to mention the Hay-Pauncefote Treaty between the United States and Great Britain regarding the proposed Nicaragua Canal, signed on February 5, 1900, which was ratified with modifications by the Senate of the United States, this being equivalent to refusal of ratification. (See below, § 517.)

§ 515. No rule of International Law exists which prescribes a necessary form of ratification. Ratification can therefore be given as well tacitly as expressly. Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it. Further, ratification may be given orally or in writing, although I am not aware of any case in which ratification was given orally. For it is usual for ratification to take the form of a document duly signed by the heads of the States concerned and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the convention, and to exchange these documents between the parties. Sometimes the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited. As ratification is the necessary confirmation only of an already existing treaty, the essential requirement in a ratifying document is merely that it refer clearly and unmistakably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement, and I

Form of
Ratifica-
tion.

cannot agree with those writers who maintain that the whole of the treaty ought to be recited *verbatim*.¹

Ratifica-
tion by
whom
effected.

§ 516. Ratification is effected by those organs which exercise the treaty-making power of the States. These organs are regularly the heads of the States, but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of the globe to other representatives. Thus, the Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India, and the Governor-General of Turkestan has a similar power for the Emperor of Russia.

In case the head of a State ratifies a treaty, although the necessary constitutional requirements have not been previously fulfilled, as, for instance, in the case in which a treaty has not received the necessary approval from the Parliament of the said State, the question arises whether such ratification is valid or null and void. Many writers¹ maintain that such ratification is nevertheless valid. But this opinion is not correct, because it is clearly evident that in such a case the head of the State has exceeded his powers, and that, therefore, the State concerned cannot be held to be bound by the treaty.² The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point. It is true that the United States insisted on payment of the indemnity stipulated by a treaty which had been ratified by the King of France without having received the necessary approval of the French Parliament, but the United States did not maintain that the ratification was valid; she insisted upon payment because the French Government had admitted that such indemnity was due to her.³

¹ See, for instance, Martens, § 107, and Rivier, II. p. 85.

² See above, § 497, and Nippold, p. 147.

³ See Wharton, II. § 131A, p. 20.

§ 517. It follows from the nature of ratification as a necessary confirmation of a treaty already concluded that ratification must be either given or refused, no conditional or partial ratification being possible. That occasionally a State tries to modify a treaty in ratifying it cannot be denied, yet conditional ratification is no ratification at all, but equivalent to refusal of ratification. Nothing, of course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications; but it must be emphasised that such negotiations are negotiations for a new treaty,¹ the old treaty having become null and void through its conditional ratification. On the other hand, no obligation exists for such party to enter into fresh negotiations, it being a fact that conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground. Thus, for instance, when the United States Senate on December 20, 1900, in consenting² to the ratification of the Hay-Pauncefote Treaty as regards the Nicaragua Canal, added modifying amendments, Great Britain did not accept the amendments and considered the treaty fallen to the ground.

Ratification can not be partial and conditional.

Quite particular is the case of a treaty to which a greater number of States are parties and which is only partially ratified by one of the contracting parties. Thus France, in ratifying the General Act of the Brussels

¹ This is the correct explanation of the practice on the part of States, which sometimes prevails, of acquiescing, after some hesitation, in alterations proposed by a party to a treaty in ratifying it; see examples in Pradier-Fodéré, II. No. 1104, and Calvo, III. § 1630.

² It is of importance to emphasise that the United States' Senate, in proposing an amendment to a treaty before its ratification, does not, strictly speaking, ratify such treaty conditionally, since it is the Presi-

dent, and not the Senate, who possesses the power of granting or refusing ratification; see Willoughby, "The Constitutional Law of the United States" (1910), I. p. 462, note 14. The President, however, according to article 2 of the Constitution, cannot grant ratification without the consent of the Senate, and the proposal of an amendment to a treaty on the part of the Senate, therefore, comprises, indirectly, the proposal of a new treaty.

Anti-Slavery Conference of July 2, 1890, excepted from ratification articles 21 to 23 and 42 to 61, and the Powers have acquiesced in this partial ratification, so that France is not bound by these twenty-three articles.¹

But it must be emphasised that ratification is only then partial and conditional if one or more stipulations of the treaty which has been signed without reservation are exempted from ratification, or if an amending clause is added to the treaty during the process of ratification. (It is therefore quite legitimate for a party who has signed a treaty with certain reservations as regards certain articles² to ratify the approved articles only, and it would be incorrect to speak in this case of a partial ratification.

Again, it is quite legitimate—and one ought not in that case to speak of conditional ratification—for a contracting party who wants to secure the interpretation of certain terms and clauses of a treaty to grant ratification with the understanding only that such terms and clauses should be interpreted in such and such a way. Thus when, in 1911, opposition arose in Great Britain to the ratification of the Declaration of London on account of the fact that the meaning of certain terms was ambiguous and that the wording of certain clauses did not agree with the interpretation given to them by the Report of the Drafting Committee, the British Government declared that they would only ratify with the understanding that the interpretation contained in the Report should be considered as binding and that the ambiguous terms concerned should have a determinate meaning. In such cases ratification does not introduce an amendment or an alteration, but only fixes the meaning of otherwise doubtful terms and clauses of the treaty.

¹ See Martens, N.R.G. 2nd Ser. XXII. (1897), p. 260.

² See below, § 519.

§ 518. The effect of ratification is the binding force of the treaty. But the question arises whether the effect of ratification is retroactive, so that a treaty appears to be binding from the date when it is duly signed by the representatives. No unanimity exists among publicists as regards this question. As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect. Different, however, is of course the case in which the contrary is expressly stipulated in the very treaty, and, again, the case when a treaty contains such stipulations as shall at once be executed, without waiting for the necessary ratification. Be this as it may, ratification makes a treaty binding only if the original consent was not given in error or under a delusion.¹ If, however, the ratifying State discovers such error or delusion and ratifies the treaty nevertheless, such ratification makes the treaty binding. And the same is valid as regards a ratification given to a treaty although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty.

Effect of
Ratifica-
tion.

VI

EFFECT OF TREATIES

Hall, § 114—Lawrence, § 134—Halleck, I. pp. 279–281—Taylor, §§ 370–373—Wharton, II. § 137—Wheaton, § 266—Bluntschli, §§ 415–416—Hartmann, § 49—Heffter, § 94—Bonfils, Nos. 845–848—Despagnet, Nos. 447–448—Pradier-Fodéré, II. Nos. 1151–1155—Mérignhac, II. pp. 667–672—Rivier, II. pp. 119–122—Calvo, III. §§ 1643–1648—Fiore, II. Nos. 1008–1009, and Code, Nos. 768–778—Martens, I. §§ 65 and 114—Nippold, op. cit. pp. 151–160.

§ 519. By a treaty the contracting parties in the first place are concerned. The effect of the treaty upon them is that they are bound by its stipulations, and that

Effect of
Treaties
upon Con-
tracting
Parties.

¹ See above, § 500.

they must execute it in all its parts. No distinction should be made between more and less important parts of a treaty as regards its execution. Whatever may be the importance or the insignificance of a part of a treaty, it must be executed with good faith, for the binding force of a treaty covers equally all its parts and stipulations. If, however, a party to a treaty concluded between more than two parties signs it with a reservation as regards certain articles, such party is not bound by these articles, although it ratifies¹ the treaty.)

Effect of
Treaties
upon the
Subjects
of the
Parties.

§ 520. It must be specially observed that (the binding force of a treaty concerns the contracting States only, and not their subjects.) As International Law is a law between States only and exclusively, treaties can have effect upon States and can bind States only and exclusively. (If treaties contain stipulations with regard to rights and duties of the contracting States' subjects,² courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like. It may be that according to the Municipal Laws of some countries the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments.³)

Effect of
Changes
in Go-
vernment
upon
Treaties.

§ 521. (As treaties are binding upon the contracting States, changes in the government or even in the form of government of one of the parties can as a rule have no influence whatever upon the binding force of treaties. Thus, for instance, a treaty of alliance concluded by a State with constitutional government remains valid,

¹ See above, § 518.

² See above, § 289.

³ The distinction between International and Municipal Law as discussed above, §§ 20-25, is the

basis from which the question must be decided whether international treaties have a direct effect upon the officials and subjects of the contracting parties.

although the Ministry may change. And no head of a State can shirk the obligations of a treaty concluded by his State under the government of his predecessor. Even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same. For all such changes and alterations, important as they may be, do not alter the person of the State which concluded the treaty. If, however, a treaty stipulation essentially presupposes a certain form of government, then a change from such form makes such stipulation void, because its execution has become impossible.¹

§ 522. According to the principle *pacta tertiis nec nocent nec prosunt*, a treaty concerns the contracting States only; neither rights nor duties, as a rule, arise under a treaty for third States which are not parties to the treaty. But (sometimes treaties have indeed an effect upon third States. Such an effect is always produced when a treaty touches previous treaty rights of third States.) Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause*² with one of the contracting parties.

Effect of
Treaties
upon
third
States.

The question arises whether in exceptional cases third States can acquire rights under such treaties as were specially concluded for the purpose of creating such rights not only for the contracting parties but also for third States. Thus, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901,

¹ See below, § 542. Not to be confounded with the effect of changes in government is the effect of a change in international status upon treaties, as, for instance, if a hitherto full-sovereign State becomes half- or part-Sovereign, or *vice versa*, or if a State merges entirely into another,

and the like. This is a case of succession of States which has been discussed above, §§ 82–84; see also below, § 548.

² See below, § 580, but note the American interpretation of this clause.

and the Hay-Varilla Treaty between the United States and Panama of 1903, stipulate that the Panama Canal to be built shall be open to vessels of commerce and of war of all nations, although Great Britain, the United States, and Panama only are parties.¹ Thus, further, article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, stipulates that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chili only are parties. Again, the Treaty of Paris, signed on March 30, 1856, and annexed to the Peace Treaty of Paris of 1856, stipulates that Russia shall not fortify the Aland² Islands; although this stipulation was made in the interest of Sweden, only Great Britain, France, and Russia are parties. I believe that the question must be answered in the negative, and nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime acquired such rights through the unanimous tacit consent of all concerned.

It must be emphasised that a treaty between two States can never invalidate a stipulation previously created by a treaty between one of the contracting parties and a third State, unless the latter expressly consents. If, for instance, two States have entered into an alliance and one of them afterwards concludes a treaty with a third State, according to which all conflicts without exception shall be settled by arbitration, the previous treaty of alliance remains valid even in the case of war breaking out between the third State and the other party to the alliance.³ Therefore, when in 1911 Great Britain contemplated entering, with the United States of America, into a treaty of general arbitration according to which all differences should

¹ See above, § 184.

² See above, § 205, p. 277, note 2.

³ See below, § 573.

be decided by arbitration, she notified Japan of her intention, on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance,¹ article 4 of which stipulates that the alliance shall never concern a war with a third Power with whom one of the allies may have concluded a treaty of general arbitration.

VII

MEANS OF SECURING PERFORMANCE OF TREATIES

Vattel, II. §§ 235-261—Hall, § 115—Lawrence, § 134—Phillimore, II. §§ 54-63A—Bluntschli, §§ 425-441—Heffter, §§ 96-99—Geffcken in Holtzendorff, III. pp. 85-90—Ullmann, § 83—Bonfils, Nos. 838-844—Despagnet, Nos. 451-452—Pradier-Fodéré, II. Nos. 1156-1169—Rivier, II. pp. 94-97—Nys, III. pp. 36-41—Calvo, III. §§ 1638-1642—Fiore, II. Nos. 1018-1019, and Code, Nos. 784-791—Martens, I. § 115—Nippold, op. cit. pp. 212-227.

§ 523. As there is no international institution which could enforce the performance of treaties, and as history teaches that treaties have frequently been broken, various means of securing performance of treaties have been made use of. The more important of these means are oaths, hostages, pledges, occupation of territory, guarantee. Nowadays these means, which are for the most part obsolete, have no longer great importance on account of the gratifying fact that all States are now much more conscientious and faithful as regards their treaty obligations than in former times.

What means have been in use.

§ 524. Oaths are a very old means of securing the performance of treaties, which was constantly made use of not only in antiquity and the Middle Ages, but also in modern times. For in the sixteenth and seventeenth centuries all important treaties were still secured by oaths. (During the eighteenth century, however, the custom of securing treaties by oaths gradually died out,

Oaths.

¹ See below, § 569.

the last example being the treaty of alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the Cathedral at Solothurn. The employment of oaths for securing treaties was of great value in the times of absolutism, when little difference used to be made between the State and its monarch. The more the distinction grew into existence between the State as the subject of International Law on the one hand, and the monarch as the temporary chief organ of the State on the other hand, the more such oaths fell into disuse. For an oath can exercise its force on the individual only who takes it, and not on the State for which it is taken.

Hostages.

§ 525. (Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes¹ at least, become obsolete) because they have practically no value at all. The last case of a treaty secured by hostages is the Peace of Aix-la-Chapelle in 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island to the latter. The hostages sent were Lords Sussex and Cathcart, who remained in France till July 1749.

Pledge.

§ 526. The pledging of movable property by one of the contracting parties to the other for the purpose of securing the performance of a treaty is possible, but has not frequently occurred.¹ Thus, Poland is said to have pledged her crown jewels once to Prussia.² The pledging of movables is nowadays quite obsolete, although it might on occasion be revived.

Occupation of Territory.

§ 527. Occupation of territory, such as a fort or even a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State

¹ Concerning hostages nowadays taken in time of war, see below, vol. II. §§ 258-259.

² See Phillimore, II. § 55.

under a treaty. (Nowadays such occupation is only resorted to in connection with treaties of peace stipulating the payment of a war indemnity.) Thus, the preliminary peace treaty of Versailles in 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliards of francs.

§ 528. (The best means of securing treaties, and one which is still in use generally, is the guarantee of such other States as are not directly affected by the treaty. Such guarantee is a kind of accession¹ to the guaranteed treaty, and a treaty in itself—namely, the promise of the guarantor eventually to do what is in his power to compel the contracting party or parties to execute the treaty.² Guarantee of a treaty is a species only of guarantee in general, which will be discussed below, §§ 574–576a.

Guaran-
tee.

VIII

PARTICIPATION OF THIRD STATES IN TREATIES

Hall, § 114—Wheaton, § 288—Hartmann, § 51—Heffter, § 88—Ullmann, § 81—Bonfil, Nos. 832–834—Despagnet, No. 448—Pradier-Fodéré, II. Nos. 1127–1150—Rivier, II. pp. 89–93—Calvo, III. §§ 1621–1626—Fiore, II. Nos. 1025–1031—Martens, I. § 111.

§ 529. Ordinarily a treaty creates rights and duties between the contracting parties exclusively. Nevertheless, third States may be interested in such treaties, for the common interests of the members of the Family of Nations are so interlaced that few treaties between single members can be concluded in which third States have not some kind of interest. But such interest, all-important as it may be, must not be confounded with

Interest
and
Participa-
tion to be
distin-
guished.

¹ See below, § 532.

² Nippold (p. 266) proposes that a universal treaty of guarantee should be concluded between all the members of the Family of Nations

guaranteeing for the present and the future all international treaties. I do not believe that this well-meant proposal is feasible.

participation of third States in treaties.) Such participation can occur in five different forms—namely, good offices, mediation, intervention, accession, and adhesion.¹

Good
Offices
and
Mediation.

§ 530. A treaty may be concluded with the help of the good offices or through the mediation of a third State, whether these offices be asked for by the contracting parties or be exercised spontaneously by a third State. Such third State, however, does not necessarily, either through good offices or through mediation, become a real party to the treaty, although this might be the case. A great many of the most important treaties owe their existence to the good offices or mediation of third Powers. The difference between good offices and mediation will be discussed below, vol. II. § 9.

Interven-
tion.

§ 531. A third State may participate in a treaty in such a way that it interposes dictatorially between two States negotiating a treaty and requests them to drop or to insert certain stipulations. Such intervention does not necessarily make the interfering State a real party to the treaty. Instances of threatened intervention of such a kind are the protest on the part of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano² between Russia and Turkey, and that on the part of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki³ between Japan and China.

Accession.

§ 532. Of accession there are two kinds. Accession means, firstly, the formal entrance of a third State into an existing treaty so that such State becomes a

¹ That certain treaties concluded by the suzerain are *ipso facto* concluded for the vassal State does not make the latter participate in such treaties. Nor is it correct to speak of participation of a third State in a treaty when a State becomes party to a treaty through the fact that it

has given a mandate to another State to contract on its behalf.

² See above, § 135, p. 190, No. 2.

³ See R.G. II. pp. 457–463. Details concerning intervention have been given above, § 134–138; see also below, vol. II. § 50.

party to the treaty with all rights and duties arising therefrom. Such accession can take place only with the consent of the original contracting parties, and accession always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State. And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention for example, regularly stipulate the option of accession of all such States as have not been originally contracting parties.

But (there is, secondly, another kind of accession possible. For a State may enter into a treaty between other States for the purpose of guarantee.¹ This kind of accession makes the acceding State also a party to the treaty; but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty.)

§ 533. Adhesion is defined as such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty. Whereas through accession a third State becomes a party to the treaty with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be specially observed that the distinction between accession and adhesion is one made in theory, to which practice frequently does not correspond. Often treaties speak of accession of third States where in fact adhesion only is meant, and *vice versa*. Thus, article 6 of the Hague Convention with respect to the laws and customs of war on land stipulates the possibility of future *adhesion* of non-signatory Powers, although accession is meant. Adhesion.

¹ See above, § 528.

IX

EXPIRATION AND DISSOLUTION OF TREATIES

Vattel, II. §§ 198–205—Hall, § 116—Westlake, I. pp. 284–286—Lawrence, § 134—Halleck, I. pp. 293–296—Taylor, §§ 394–399—Wharton, II. § 137A—Wheaton, § 275—Moore, V. §§ 770–778—Bluntschli, §§ 450–461—Heffter, § 99—Ullmann, § 85—Bonfils, Nos. 855–860—Despagnet, Nos. 453–455—Pradier-Fodéré, II. Nos. 1200–1218—Mérignhac, II. p. 788—Rivier, II. § 55—Nys, III. pp. 48–53—Calvo, III. §§ 1662–1668—Fiore, II. Nos. 1047–1052—Martens, I. § 117—Jellinek, “Die rechtliche Natur der Staatenverträge” (1880), pp. 62–64—Nippold, op. cit. pp. 235–248—Olivi, “Sull’ estinzione dei trattati internazionali” (1883)—Schmidt, “Ueber die völkerrechtliche *clausula rebus sic stantibus*, &c.” (1907)—Kaufmann, “Das Wesen des Völkerrechts und die *clausula rebus sic stantibus*” (1911)—Bonucci in Z.V. IV. (1910), pp. 449–471.

Expira-
tion and
Dissolu-
tion in
Contradis-
tinction
to Fulfil-
ment.

§ 534. The binding force of treaties may terminate in four different ways, because a treaty may either expire, or be dissolved, or become void, or be cancelled.¹ The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolute condition. Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances.) In contradistinction to expiration and dissolution as well as to voidance and cancellation, performance of treaties does not terminate their binding force. A treaty whose obligation has been performed is as valid as before, although it is now of historical interest only.

Expira-
tion
through
Expira-
tion
of Time.

§ 535. All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed or prolonged for another period. Such time-expiring treaties are frequently concluded, and no notice is necessary for their expirations, except when specially stipulated.)

¹ The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, as far as I know, nowhere sharply drawn, although it

would seem to be of considerable importance. Voidance and cancellation will be discussed below, §§ 540–544 and 545–549.

A treaty, however, may be concluded for a certain period of time only, but with the additional stipulation that the treaty shall after the lapse of such period be valid for another such period, unless one of the contracting parties gives notice in due time.

§ 536. Different from time-expiring treaties are such as are concluded under a resolute condition, which means under the condition that they shall at once expire with the occurrence of certain circumstances. As soon as these circumstances arise, the treaties expire.

Expira-
tion
through
Resolute
Condition.

§ 537. A treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties. Such mutual consent can become apparent in three different ways.

Mutual
Consent.

(First, the parties can expressly and purposely declare that a treaty shall be dissolved; this is rescission. Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty without any reference to the latter, although the two treaties are inconsistent with each other. (This is substitution, and in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent. Or, thirdly, if the treaty is such as imposes obligations upon one of the contracting parties only, the other party can renounce its rights. Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary.

§ 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after notice by one of the parties. Many treaties stipulate expressly the possibility of such withdrawal, and as a rule contain details in regard to form and period in which notice is to be given for the purpose of withdrawal. But there are other treaties which, although they do not expressly stipulate the

With-
drawal by
Notice.

possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever or apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty or a treaty of alliance not concluded for a fixed period only can always be dissolved after notice, although such notice be not expressly stipulated. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are as a rule not notifiable, although they can be dissolved by mutual consent of the contracting parties.

It must be emphasised that all treaties of peace and all boundary treaties belong to this class. It cannot be denied that history records many cases in which treaties of peace have not established an everlasting condition of things, since one or both of the contracting States took up arms again as soon as they recovered from the exhausting effect of the previous war. But this does not prove either that such treaties can be dissolved through giving notice, or that, at any rate as far as International Law is concerned, they are not intended to create an everlasting condition of things.

Vital
Change of
Circum-
stances.

§ 539. Although, as just stated, treaties concluded for a certain period of time, and such treaties as are apparently intended or expressly contracted for the purpose of setting up an everlasting condition of things, cannot in principle be dissolved by withdrawal of one of the parties, there is an exception to this rule. For it is an almost universally recognised fact that vital changes of circumstances may be of such a kind as to justify a party in notifying an unnotifiable treaty. The vast majority of publicists, as well as all the Governments of the members of the Family of Nations, defend

the principle *Conventio omnis intelligitur rebus sic stantibus*, and they agree,¹ therefore, that all treaties are concluded under the tacit condition *rebus sic stantibus*. That this condition involves a certain amount of danger cannot be denied, for it can be, and indeed sometimes has been, abused for the purpose of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness. But all this cannot alter the fact that this exceptional condition is as necessary for International law and international intercourse as the very rule *pacta sunt servanda*. When, for example, the existence or the necessary development of a State stands in unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State. No State would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a State to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and development, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said State's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable.

The danger of the clause *rebus sic stantibus* is to be found in the elastic meaning of the term "vital changes of circumstances," as, after all, a State must in every

¹ See Bonucci in Z.V. IV. (1910), pp. 449-471. Many writers agree to it with great reluctance only and in a very limited sense, as, for instance, Grotius, II. c. 16, § 25, No. 2; Vattel, II. § 296; Klüber, § 165. Some few writers, however, disagree altogether, as, for instance, Bynkershoek, "Quest. jur. public." II. c. 10, and Wildman,

"Institutes of International Law," I. (1849), p. 175. Schmidt, op. cit. pp. 97-118, would seem to reject the *clausula* altogether, but can nevertheless not help recognising it in the end. A good survey of the practice of the States in the matter during the nineteenth century is given by Kaufmann, op. cit. pp. 12-37.

special case judge for itself whether or no there is a vital change of circumstances justifying its withdrawal from an unnotifiable treaty. On the other hand, the danger is counterbalanced by the fact that the frequent and unjustifiable use of the clause *rebus sic stantibus* by a State would certainly destroy all its credit among the nations.

Be that as it may, it is generally agreed that certainly not every change of circumstances justifies a State in making use of the clause. All agree that, although treaty obligations may through a change of circumstances become disagreeable, burdensome, and onerous, they must nevertheless be discharged. All agree, further, that a change of government and even a change in the form of a State, such as the turning of a monarchy into a republic and *vice versa*, does not alone and in itself justify a State in notifying such a treaty as is by its nature unnotifiable. On the other hand, all agree in regard to many cases in which the clause *rebus sic stantibus* could justly be made use of. Thus, for example, if a State enters into a treaty of alliance for a certain period of time, and if before the expiration of the alliance a change of circumstances occurs, so that now the alliance endangers the very existence of one of the contracting parties, all will agree that the clause *rebus sic stantibus* would justify such party in notifying the treaty of alliance.

A certain amount of disagreement as to the cases in which the clause might or might not be justly applied will of course always remain. But the fact is remarkable that during the nineteenth century not many cases of the application of the clause have occurred. And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a State at once to liberate itself from the obligations of a treaty, but only

the claim to be released from these obligations by the other parties to the treaty.) Accordingly, when a State is of the opinion that the obligations of a treaty have through a vital change of circumstances become unbearable, it should first approach the other party or parties and request them to abrogate the treaty. (And it is only when such abrogation is refused that a State may perhaps be justified in declaring that it could no longer consider itself bound by the obligations concerned.) Thus, when, in 1870, during the Franco-German War, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralisation of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea, Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, England, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia and abolished the neutralisation of the Black Sea, it adopted in a protocol¹ of January 17, 1871, the following declaration:—"Que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des parties contractantes, au moyen d'une entente amicale."

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum.² The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of Great Britain, which protested. Again, in October 1908, Austria-Hungary, in defiance of article

¹ See Martens, N.R.G. XVIII. p. 278.

² See Martens, N.R.G. 2nd Ser. XIV. p. 170, and Rolin-Jaequemyns in R.I. XIX. (1887), pp. 37-49.

25 of the Treaty of Berlin, 1878, proclaimed her sovereignty over Bosnia and Herzegovina, which hitherto had been under her occupation and administration, and simultaneously Bulgaria, in defiance of article 1 of the same treaty, declared herself independent.¹ Thus the standard value of the Declaration of the Conference of London of 1871 has become doubtful again.

X

VOIDANCE OF TREATIES

See the literature quoted at the commencement of § 534.

Grounds
of Void-
ance.

§ 540. (A treaty, although it has neither expired nor been dissolved, may nevertheless lose its binding force by becoming void.² And such voidance may have different grounds—namely, extinction of one of the two contracting parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of such object as was concerned in a treaty.)

Extinction of
one of the
two Contracting
Parties.

§ 541. All treaties concluded between two States become void through the extinction of one of the contracting parties, provided they do not devolve upon such State as succeeds to the extinct State. That some treaties devolve upon the successor has been shown above (§ 82), but many treaties do not. On

¹ See above, § 50, p. 76; Martens, N.R.G. 3rd Ser. II. p. 606; and Blochszewski in R.G. XVII. (1910), pp. 417–449. There is hardly any doubt that, if Austria-Hungary had not ignored the above-mentioned Declaration contained in the protocol of January 17, 1871, and had approached the Powers in the matter, the abrogation of article 25 of the Treaty of Berlin would have been granted and she would have been allowed to annex Bosnia and Herzegovina after having indem-

nified Turkey. This is to be inferred from the fact that, when Austria-Hungary proclaimed her sovereignty over the provinces, Turkey accepted compensation, and the Powers, which first had protested and demanded an international conference, consented to the abrogation of the Treaty of Berlin.

² But such voidance must not be confounded with the voidance of a treaty from its very beginning; see above, § 501.

this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void.

§ 542. All treaties whose execution becomes impossible subsequent to their conclusion are thus rendered void. A frequently quoted example is that of three States concluding a treaty of alliance and subsequent war breaking out between two of the contracting parties. In such case it is impossible for the third party to execute the treaty, and it becomes void.¹ It must, however, be added that the impossibility of execution may be temporary only, and that then the treaty is not void but merely suspended.

Impos-
sibility of
Execution

§ 543. All treaties whose purpose is realised otherwise than by fulfilment become void. For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void if the third State voluntarily undertakes the same obligation before the two contracting States have had an opportunity of approaching the third State with regard to the matter.

Realisa-
tion of
Purpose of
Treaty
other than
by Fulfil-
ment.

§ 544. All treaties whose obligations concern a certain object become void through the extinction of such object. Treaties, for example, concluded in regard to a certain island become void when such island disappears through the operation of nature, as likewise do treaties concerning a third State when such State merges in another.

Extinc-
tion of
such
Object as
was con-
cerned in
a Treaty.

¹ See also above, § 521, where the case is mentioned that a treaty essentially presupposes a certain form of government, and for this

reason cannot be executed when this form of government undergoes a change.

XI

CANCELLATION OF TREATIES

See the literature quoted at the commencement of § 534.

Grounds
of Cancel-
lation.

§ 545. A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding force by cancellation. The causes of cancellation are four—namely, inconsistency with International Law created subsequent to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war.

Inconsis-
tency with
sub-
sequent
Inter-
national
Law.

§ 546. Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through a progressive development of International Law they become inconsistent with the latter. Through the abolition of privateering among the signatory Powers of the Declaration of Paris of 1856, for example, all treaties between any of these Powers based on privateering as a recognised institution of International Law were *ipso facto* cancelled.¹ But it must be emphasised that subsequent Municipal Law can certainly have no such influence upon existing treaties. On occasions, indeed, subsequent Municipal Law creates for a State a conflict between its treaty obligations and such law. In such case this State must endeavour to obtain a release by the other contracting party from these obligations.²

¹ This must be maintained in spite of the fact that Protocol No. 24—see Martens, N.R.G. XV. (1857), pp. 768–769—contains the following: “Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnaît que la présente résolution, ne pouvant avoir d’effet retroactif, ne saurait invalider les Conventions antérieures.” This expression of opinion can only mean that previous treaties with such States as were not and would not

become parties to the Declaration of Paris are not *ipso facto* cancelled by the Declaration.

² That Municipal Courts must apply the subsequent Municipal Law although it conflicts with previous treaty obligations, there is no doubt, as has been pointed out above, § 21. See *The Cherokee Tobacco*, 11 Wall 616; *Whitney v. Robertson*, 124 United States 190; *Botiller v. Dominguez*, 130 United States 238. See also Moore, V. § 774.

§ 547. Violation of a treaty by one of the contracting States does not *ipso facto* cancel such treaty, but it is in the discretion of the other party to cancel it on the ground of violation. There is no unanimity among writers on International Law in regard to this point, in so far as a minority makes a distinction between essential and non-essential stipulations of the treaty, and maintains that violation of essential stipulations only creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential stipulations as well as essential ones, and that it is for the faithful party to consider for itself whether violation of a treaty, even in its least essential parts, justifies the cancelling of the treaty. The case, however, is different when a treaty expressly stipulates that it should not be considered broken by violation of merely one or another part of it. And it must be emphasised that the right to cancel the treaty on the ground of its violation must be exercised within a reasonable time after the violation has become known. If the Power possessing such right does not exercise it in due time, it must be taken for granted that such right has been waived. A mere protest, such as the protest of England in 1886 when Russia withdrew from article 59 of the Treaty of Berlin of 1878, which stipulated the freedom of the port of Batoum, neither constitutes a cancellation nor reserves the right of cancellation.

Violation by one of the Contracting Parties.

§ 548. A cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transforms it into a dependency of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be con-

Subsequent Change of Status of one of the Contracting Parties.

sidered to have taken place, or, further, as regards the other question as to the kind of treaties cancelled by such change.¹ Thus, for example, when a State becomes a member of a Federal State, it is obvious that all its treaties of alliance are *ipso facto* cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the several members. And the same is valid as regards a hitherto full-Sovereign State which comes under the suzerainty of another State. On the other hand, a good many treaties retain their binding force in spite of such a change in the status of a State, all such treaties, namely, as concern matters in regard to which the State has not lost its sovereignty through the change. For instance, if the constitution of a Federal State stipulates that the matter of extradition remains fully in the competence of the member-States, all treaties of extradition of members concluded with third States previous to their becoming members of the Federal State retain their binding force.

War.

§ 549. How far war is a general ground of cancellation of treaties is not quite settled. Details on this point will be given below, vol. II. § 99.

XII

RENEWAL, RECONFIRMATION, AND REDINTEGRATION OF TREATIES

Vattel, II. § 199—Hall, § 117—Taylor, § 400—Hartmann, § 51—Ullmann, § 85—Bonfils, Nos. 851–854—Despagnet, No. 456—Pradier-Fodéré, II. Nos. 1191–1199—Rivier, II. pp. 143–146—Calvo, III. §§ 1637, 1666, 1669—Fiore, II. Nos. 1048–1049, and Code, Nos. 835–838.

Renewal
of
Treaties.

§ 550. Renewal of treaties is the term for the prolongation of such treaties before their expiration as were concluded for a definite period of time only. Renewal

¹ See Moore, V. § 773, and above, § 82, p. 128, note 1, and § 521.

can take place through a new treaty, and the old treaty may then be renewed as a body or in parts only. But the renewal can also take place automatically, many treaties concluded for a certain period stipulating expressly that they are considered renewed for another period in case neither of the contracting parties has given notice.)

§ 551. (Reconfirmation is the term for the express statement made in a new treaty that a certain previous treaty, whose validity has or might have become doubtful, is still, and remains, valid.) Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty; for instance, after a war, as regards such treaties as have not been cancelled by the outbreak of war. Reconfirmation can be given to the whole of a previous treaty or to parts of it only. Sometimes reconfirmation is given in this very precise way, that a new treaty stipulates that a previous treaty shall be incorporated in itself. It must be emphasised that in such a case those parties to the new treaty which have not been parties to the previous treaty do not now become so by its reconfirmation, the latter applying to the previous contracting parties only.

Recon-
firmation.

§ 552. Treaties which have lost their binding force through expiration or cancellation may regain it through redintegration. A treaty becomes redintegrated by the mutual consent of the contracting parties regularly given in a new treaty. Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war whose stipulations the contracting parties do not want to alter.

Redinte-
gration.

Without doubt, redintegration does not necessarily take place exclusively by a treaty, as theoretically it must be considered possible for the contracting parties tacitly to redintegrate an expired or cancelled treaty by a line

of conduct which indicates apparently their intention to reintegrate the treaty. However, I do not know of any instance of such tacit reintegration.

XIII

INTERPRETATION OF TREATIES

Grotius, II. c. 16—Vattel, II. §§ 262–322—Hall, §§ 111–112—Phillimore, II. §§ 64–95—Halleck, I. pp. 296–304—Taylor, §§ 373–393—Walker, § 31—Wheaton, § 287—Moore, V. §§ 763–764—Heffter, § 95—Ullmann, § 84—Bonfilis, Nos. 835–837—Despagnet, No. 450—Pradier-Fodéré, II. Nos. 1171–1189—Mérignhac, II. p. 678—Nys, III. pp. 41–43—Rivier, II. pp. 122–125—Calvo, III. §§ 1649–1660—Fiore, II. Nos. 1032–1046, and Code, Nos. 792–816—Martens, I. § 116—Westlake, I. pp. 282–283—Pick in R.G. XVII. (1907), pp. 5–35—Hyde in A.J. III. (1909), pp. 46–61.

Authentic
Interpre-
tation,
and the
Com-
promise
Clause.

§ 553. Neither customary nor conventional rules of International Law exist concerning interpretation of treaties. Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to interpretation of treaties. On the whole, such application is correct in so far as those rules of Roman Law are full of common sense. But it must be emphasised that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing. And these scientific grounds can be no other than those provided by jurisprudence. (The best means of settling questions of interpretation, provided the parties cannot come to terms, is arbitration) as the appointed arbitrators will apply the general rules of jurisprudence. Now in regard to interpretation given by the parties themselves, there are two different ways open to them. (They may either agree informally upon the interpretation and execute the treaty accordingly; or they may make an additional new treaty and stipu-

late therein such interpretation of the previous treaty as they choose. In the latter case one speaks of "authentic" interpretation in analogy with the authentic interpretation of Municipal Law given expressly by a statute. Nowadays treaties very often contain the so-called "compromise clause" as regards interpretation—namely, the clause that, in case the parties should not agree on questions of interpretation, these questions shall be settled by arbitration.) Italy and Switzerland regularly endeavour to insert that clause in their treaties.

§ 554. It is of importance to enumerate some rules of interpretation¹ which recommend themselves on account of their suitability.

Rules of Interpretation which recommend themselves.

(1) All treaties must be interpreted according to their reasonable in contradistinction to their literal sense.) An excellent example illustrating this rule is the following, which is quoted by several writers:—In the interest of Great Britain the Treaty of Peace of Utrecht of 1713 stipulated in its article 9 that the port and the fortifications of Dunkirk should be destroyed and never be rebuilt. France complied with this stipulation, but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France in so acting was violating the reasonable, although not the literal, sense of the Peace of Utrecht, and France in the end recognised this interpretation and discontinued the building of the new port.

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of every-day life, provided they are not expressly used in a certain technical meaning or another meaning is not apparent from the context.)

¹ The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore, II. §§

64–95; see also Moore, V. § 763, and Wharton, II. § 133.

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law nor with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States.

(4) The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, such meaning is to be preferred as is less onerous for the obliged party, or as interferes less with the parties' territorial and personal supremacy, or as contains less general restrictions upon the parties.

(5) Previous treaties between the same parties, and treaties between one of the parties and third parties, may be alluded to for the purpose of clearing up the meaning of a stipulation.

(6) If there is a discrepancy between the clear meaning of a stipulation, on the one hand, and, on the other, the intentions of one of the parties declared during the negotiations preceding the signing of a treaty, the decision must depend on the merits of the special case. If, for instance, the discrepancy was produced through a mere clerical error or by some other kind of mistake, it is obvious that an interpretation is necessary in accordance with the real intentions of the contracting parties.

(7) In case of a discrepancy between the clear

meaning of a stipulation, on the one hand, and, on the other, the intentions of all the parties unanimously declared during the negotiations preceding the signing of the treaty, the meaning which corresponds to the real intentions of the parties must prevail over the meaning of the text. If, therefore—as in the case of the Declaration of London of 1909—the Report of the Drafting Committee contains certain interpretations and is unanimously accepted as authoritative by all the negotiators previous to the signing of the treaty, their interpretations must prevail.

(8) If two meanings of a stipulation are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it. ✓

(9) If it is a matter of common knowledge that a State upholds a meaning which is different from the generally prevailing meaning of a term, and if nevertheless another State enters into a treaty with the former in which such term is made use of, such meaning must prevail as is upheld by the former. If, for instance, States conclude commercial treaties with the United States of America in which the most-favoured-nation clause¹ occurs, the particular meaning which the United States attribute to this clause must prevail.

(10) If the meaning of a stipulation is ambiguous and one of the contracting parties, at a time before a case arises for the application of the stipulation, makes known what meaning it attributes to the stipulation, the other party or parties cannot, when a case for the application of the stipulation occurs, insist upon a different meaning. They ought to have previously protested and taken the necessary steps to secure an authentic interpretation of the ambiguous stipulation.

¹ See below, § 580.

Thus, when in 1911 it became obvious that Germany and other continental States attributed to article 23(h) of the Hague Regulations respecting the Laws and Usages of War on Land a meaning different from the one preferred by Great Britain, the British Foreign Office made the British interpretation of this article known.

(11) It is to be taken for granted that the parties intend the stipulations of a treaty to have a certain effect and not to be meaningless. Therefore, such interpretation is not admissible as would make a stipulation meaningless or inefficient.

(12) All treaties must be interpreted so as to exclude fraud and so as to make their operation consistent with good faith.

✓ (13) The rules commonly applied by the Courts as regards the interpretation and construction of Municipal Laws are in so far only applicable to the interpretation and construction of treaties, and in especial of law-making treaties, as they are general rules of jurisprudence. If, however, they are particular rules, sanctioned only by the Municipal Law or by the practice of the Courts of a particular country, they may not be applied.

(14) If a treaty is concluded in two languages, for instance, a treaty between Great Britain and France in English and French, and if there is a discrepancy between the meaning of the two different texts, each party is only bound by the text of its own language. But a party cannot claim any advantage from the text of the language of the other party.

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

IMPORTANT LAW-MAKING TREATIES

§ 555. Law-making treaties¹ have been concluded ever since International Law came into existence. It was not until the nineteenth century, however, that such law-making treaties existed as are of world-wide importance. Although at the Congress at Münster and Osnabrück all the then existing European Powers, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands, on the one hand, and, on the other, the practical sovereignty of the then existing 355 States of the German Empire, was not of world-wide importance, in spite of the fact that it contains various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815, and the last, as yet, is the Declaration of London of 1909. But it must be particularly noted that not all of these are *pure* law-making treaties, since many contain other stipulations besides those which are law-making.

Important
Law-
making
Treaties a
product of
the Nine-
teenth
Century.

¹ Concerning the conception of law-making treaties, see above, §§ 18 and 492.

Final Act
of the
Vienna
Congress.

§ 556. The Final Act of the Vienna Congress,¹ signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprises law-making stipulations of world-wide importance concerning four points—namely, first, the perpetual neutralisation of Switzerland (article 118, No. 11); secondly, free navigation on so-called international rivers (articles 108–117); thirdly, the abolition of the negro slave trade (article 118, No. 15); fourthly, the different classes of diplomatic envoys (article 118, No. 16).

Protocol
of the
Congress
of Aix-la-
Chapelle.

§ 557. The Protocol of November 21 of the Congress of Aix-la-Chapelle,² 1818, signed by Great Britain, Austria, France, Prussia, and Russia, contains the important law-making stipulation concerning the establishment of a fourth class of diplomatic envoys, the so-called “Ministers Resident,” to rank before the *Chargés d’Affaires*.

Treaty of
London of
1831.

§ 558. The Treaty of London³ of November 15, 1831, signed by Great Britain, Austria, France, Prussia, and Russia, comprises in its article 7 the important law-making stipulation concerning the perpetual neutralisation of Belgium.

Declara-
tion of
Paris.

§ 559. The Declaration of Paris⁴ of April 13, 1856, signed by Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, is a pure law-making treaty of the greatest importance, stipulating four rules with regard to sea warfare—namely, that privateering is abolished; that the neutral flag covers enemy goods with the exception of contraband of war; that neutral goods, contraband excepted, cannot be confiscated even when sailing under the enemy flag; that a blockade must be effective to be binding.

¹ Martens, N.R. II. p. 379. See Angeberg, “Le congrès de Vienne et les traités de 1815” (4 vols., 1863).

² Martens, N.R. IV. p. 648. See Angeberg, op. cit.

³ Martens, N.R. XI. p. 390. See Descamps, “La neutralité de la Belgique” (1902).

⁴ Martens, N.R.G. XV. p. 767.

Through accession during 1856, the following other States have become parties to this treaty: Argentina, Belgium, Brazil, Chili, Denmark, Ecuador, Greece, Guatemala, Hayti, Holland, Peru, Portugal, Sweden-Norway, and Switzerland. Japan acceded in 1886, Spain and Mexico in 1907.

§ 560. The Geneva Convention ¹ of August 22, 1864, and that of July 6, 1906, are pure law-making treaties for the amelioration of the conditions of the wounded of armies in the field. The Geneva Convention of 1864 was originally signed only by Switzerland, Baden, Belgium, Denmark, France, Holland, Italy, Prussia, and Spain, but in time all other civilised States have acceded except Costa Rica, Lichtenstein, and Monaco. A treaty ² containing articles additional to the Geneva Convention of 1864 was signed at Geneva on October 20, 1868, but was not ratified. A better fate was in store for the Geneva Convention ³ of 1906, which was signed by the delegates of thirty-five States, many of which have already granted ratification. Colombia, Costa Rica, Cuba, Nicaragua, Turkey, and Venezuela have already acceded. It is of importance to emphasise that the Convention of 1864 is not entirely replaced by the Convention of 1906, in so far as the former remains in force between those Powers which are parties to it without being parties to the latter. And it must be remembered that the Final Act of the First as well as of the Second Peace Conference contains a convention for the adaptation to sea warfare of the principles of the Geneva Convention.

Geneva
Conven-
tion.

§ 561. The Treaty of London ⁴ of May 11, 1867, signed by Great Britain, Austria, Belgium, France, Holland, Italy, Prussia, and Russia, comprises in its

Treaty of
London of
1867.

¹ Martens, N.R.G. XVIII. p. 607. See Lueder, "Die Genfer Convention" (1876), and Münzel, "Untersuchungen über die Genfer Convention" (1901).

² Martens, N.R.G. XVIII. p. 612.

³ Martens, N.R.G. 3rd Ser. II. p. 323.

⁴ Martens, N.R.G. XVIII. p. 445. See Wampach, "Le Luxembourg Neutre" (1900).

article 2 the important law-making stipulation concerning the perpetual neutralisation of Luxemburg.

Declara-
tion of St.
Peters-
burg.

§ 562. The Declaration of St. Petersburg¹ of November 29, 1868, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and other German States, Russia, Sweden-Norway, Switzerland, and Turkey—Brazil acceded later on—is a pure law-making treaty. It stipulates that projectiles of a weight below 400 grammes (14 ounces) which are either explosive or charged with inflammable substances shall not be made use of in war.

Treaty of
Berlin of
1878.

§ 563. The Treaty of Berlin² of July 13, 1878, signed by Great Britain, Austria-Hungary, France, Germany, Italy, Russia, and Turkey, is law-making with regard to Bulgaria, Montenegro, Roumania, and Servia. It is of great importance in so far as the present phase of the solution of the Near Eastern Question arises therefrom, although Bulgaria became full-sovereign in 1908.

General
Act of the
Congo
Confer-
ence.

§ 564. The General Act of the Congo Conference³ of Berlin of February 26, 1885, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Holland, Italy, Portugal, Russia, Spain, Sweden-Norway, Turkey, and the United States of America, is a law-making treaty of great importance, stipulating: freedom of commerce for all nations within the basin of the river Congo; prohibition of slave-transport within that basin; neutralisation of Congo Territories; freedom of navigation for merchantmen of all nations on the rivers Congo and Niger; and, lastly, the obligation of the signatory Powers to notify to one another all future occupations on the coast of the African continent.

¹ Martens, N.R.G. XVIII. p. 474.

² Martens, N.R.G. 2nd Ser. III. p. 449. See Mulas, "Il congresso di Berlino" (1878).

³ Martens, N.R.G. 2nd Ser. X. p. 414. See Patzig, "Die afrikanische Konferenz und der Congostaat" (1885).

§ 565. The Treaty of Constantinople¹ of October 29, 1888, signed by Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Russia, Spain, and Turkey, is a pure law-making treaty stipulating the permanent neutralisation of the Suez Canal and the freedom of navigation thereon for vessels of all nations.

Treaty of Constantinople of 1888.

§ 566. The General Act of the Brussels Anti-Slavery Conference,² signed on July 2, 1890, by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France,³ Germany, Holland, Italy, Persia, Portugal, Russia, Sweden-Norway, Spain, Turkey, the United States of America, and Zanzibar, is a law-making treaty of great importance which stipulates a system of measures for the suppression of the slave-trade in Africa, and, incidentally, restrictive measures concerning the spirit-trade in certain parts of Africa. To revise the stipulations concerning this spirit-trade the Convention of Brussels⁴ of November 3, 1906, was signed by Great Britain, Germany, Belgium, Spain, the Congo Free State, France, Italy, Holland, Portugal, Russia, and Sweden.

General Act of the Brussels Anti-Slavery Conference.

§ 567. The Final Act of the Hague Peace Conference⁵ of July 29, 1899, was a pure law-making treaty comprising three separate conventions—namely, a convention for the peaceful adjustment of international differences, a convention concerning the law of land warfare, and a convention for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864,—and three Declarations—namely, a Declaration prohibiting, for a term of five years, the discharge of

Two Declarations of the First Hague Peace Conference.

¹ Martens, N.R.G. 2nd Ser. XV. p. 557. See above, § 183.

² Martens, N.R.G. 2nd Ser. XVI. p. 3, and XXV. p. 543. See Lentner, "Der afrikanische Sklavenhandel und die Brüsseler Konferenzen" (1891).

³ But France only ratified this General Act with the exclusion of certain articles.

⁴ Martens, N.R.G. 3rd Ser. I. p. 722.

⁵ Martens, N.R.G. 2nd Ser. XXVI. p. 920. See Holls, "The Peace Conference at the Hague" (1900), and Mérignac, "La Conférence internationale de la Paix" (1900).

projectiles and explosives from balloons, a Declaration concerning the prohibition of the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases, and a Declaration concerning the prohibition of so-called dum-dum bullets. All these conventions, however, and the first of these declarations have been replaced by the General Act of the Second Hague Peace Conference, and only the last two declarations are still in force. All the States which were represented at the Conference are now parties to these declarations except the United States of America.

Treaty of
Washington of
1901.

§ 568. The so-called Hay-Pauncefote Treaty of Washington¹ between Great Britain and the United States of America, signed November 18, 1901, although law-making between the parties only, is nevertheless of world-wide importance, because it neutralises permanently the Panama Canal, which is in course of construction, and stipulates free navigation thereon for vessels of all nations.²

Conven-
tions and
Declara-
tion of
Second
Hague
Peace
Confer-
ence.

§ 568a. The Final Act of the Second Hague Peace Conference of October 18, 1907, is a pure law-making treaty of enormous importance comprising the following thirteen conventions³ and a declaration:—

(1) Convention for the Pacific Settlement of International Disputes. All States represented at the Conference signed except Nicaragua, but some signed with reservations only. Nicaragua acceded later.

(2) Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, signed by Great Britain, Germany, the United

¹ Martens, N.R.G. 2nd Ser. XXX. p. 631.

² It ought to be mentioned that article 5 of the Boundary Treaty of Buenos Ayres, signed by Argentina and Chili on September 15, 1881—see Martens, N.R.G. 2nd Ser. XII. p. 491—contains a law-making stipulation of world-wide importance, because it neutralises the Straits of

Magellan for ever and declares them open to vessels of all nations. See above, p. 267, note 2, and below, vol. II. § 72.

Only a greater number of States have as yet ratified the Conventions, but it is to be expected that many more will grant ratification in the course of time.

States of America, Argentina, Austria-Hungary, Bolivia, Bulgaria, Chili, Columbia, Cuba, Denmark, San Domingo, Ecuador, Spain, France, Greece, Guatemala, Haiti, Italy, Japan, Mexico, Montenegro, Norway, Panama, Paraguay, Holland, Peru, Persia, Portugal, Russia, Salvador, Servia, Turkey, Uruguay; China and Nicaragua acceded later. Some of the South American States signed with reservations.

(3) Convention relative to the Opening of Hostilities. All the States represented at the Conference signed except China and Nicaragua; both, however, acceded later.

(4) Convention concerning the Laws and Usages of War on Land. All the States represented at the Conference signed except China, Spain, and Nicaragua, but Nicaragua acceded later. Some States made reservations in signing.

(5) Convention concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land. All the States represented at the Conference signed except China and Nicaragua, but some States made reservations. Both China and Nicaragua acceded later.

(6) Convention relative to the Status of Enemy Merchantmen at the Outbreak of Hostilities. All the Powers represented at the Conference signed except the United States of America, China, and Nicaragua, but the last named acceded later. Some States made reservations in signing.

(7) Convention relative to the Conversion of Merchant Ships into War Ships. All the Powers represented at the Conference signed except the United States of America, China, San Domingo, Nicaragua, and Uruguay, but Nicaragua acceded later. Turkey made a reservation in signing.

(8) Convention relative to the Laying of Automatic Submarine Contact Mines. The majority of the States represented at the Conference signed. China, Spain,

Montenegro, Nicaragua, Portugal, Russia, and Sweden have not signed, but Nicaragua acceded later. Some States made reservations.

(9) Convention respecting Bombardments by Naval Forces in Time of War. Except China, Spain, and Nicaragua all the States represented at the Conference signed, but China and Nicaragua acceded later. Some States made reservations.

(10) Convention for the Adaptation to Naval War of the Principles of the Geneva Convention. All the Powers represented at the Conference signed except Nicaragua, but some made reservations. Nicaragua acceded later.

(11) Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War. All States represented at the Conference signed except China, Montenegro, Nicaragua, and Russia, but Nicaragua acceded later.

(12) Convention relative to the Creation of an International Prize Court. The majority of the States represented at the Conference signed. Brazil, China, San Domingo, Greece, Luxemburg, Montenegro, Nicaragua, Roumania, Russia, Servia, and Venezuela have not signed, and some of the smaller signatory Powers made a reservation with regard to the composition of the Court according to article 15 of the Convention.

(13) Convention concerning the Rights and Duties of Neutral Powers in Naval War. All the States represented at the Conference signed except the United States of America, China, Cuba, Spain, and Nicaragua. Some States made reservations. But the United States of America, China, and Nicaragua acceded later.

(14) Declaration prohibiting the Discharge of Projectiles and Explosives from Balloons. Only twenty-seven of the forty-four States represented at the Conference signed. Germany, Chili, Denmark, Spain, France, Guatemala, Italy, Japan, Mexico, Montenegro,

Nicaragua, Paraguay, Roumania, Russia, Servia, Sweden, and Venezuela refused to sign, but Nicaragua acceded later.

§ 568*b*. The Declaration of London¹ of February 26, 1909, concerning the Laws of Naval War, is a pure law-making treaty of the greatest importance. All the ten Powers represented at the Conference of London which produced this Declaration signed² it—namely, Great Britain, Germany, the United States of America, Austria-Hungary, Spain, France, Italy, Japan, Holland, and Russia, but it is not yet ratified.

The
Declara-
tion of
London.

II

ALLIANCES

Grotius, II. c. 15—Vattel, III. §§ 78–102—Twiss, I. § 246—Taylor, §§ 347–349—Wheaton, §§ 278–285—Bluntschli, §§ 446–449—Heffter, § 92—Geffcken in Holtzendorff, III. pp. 115–139—Ullmann, § 82—Bonfilis, Nos. 871–881—Despagnet, No. 459—Mérignhac, II. p. 683—Nys, III. pp. 554–557—Pradier-Fodéré, II. Nos. 934–967—Rivier, II. pp. 111–116—Calvo, III. §§ 1587–1588—Fiore, II. No. 1094, and Code, Nos. 893–899—Martens, I. § 113—Rolin-Jaequemyns in R.I. XX. (1888), pp. 5–35—Erich, “Ueber Allianzen und Allianzverhältnisse nach heutigem Völkerrecht” (1907).

§ 569. Alliances in the strict sense of the term are treaties of union between two or more States for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes. The term “alliance” is, however, often made use of in a wider sense, and it comprises in such

Concep-
tion of
Alliances.

¹ On account of the opposition to the Ratification of the Declaration of London which arose in England, the English literature on the Declaration is already very great. The more important books are the following:—Bowles, “Sea Law and Sea Power” (1910); Baty, “Britain and Sea Law” (1911); Bentwich, “The Declaration of London” (1911); Bray, “British Rights at Sea” (1911); Bate, “An Elementary Account of the Declaration of London” (1911); Civis, “Cargoes

and Cruisers” (1911); Holland, “Proposed Changes in Naval Prize Law” (1911); Cohen, “The Declaration of London” (1911). See also Baty and Macdonell in the Twenty-sixth Report (1911) of the International Law Association. There are also innumerable articles in periodicals.

² There is no doubt that the majority, if not all, of the States concerned will in time accede to the Declaration of London.

cases treaties of union for various purposes. Thus, the so-called "Holy Alliance," concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, and afterwards joined by almost all of the Sovereigns of Europe, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term.

History relates innumerable alliances between the several States. They have always played, and still play, an important part in politics. At the present time the triple alliance between Germany, Austria, and Italy since 1879 and 1882, the alliance between Russia and France since 1899, and that between Great Britain and Japan since 1902, renewed in 1905 and 1911, are illustrative examples.¹

¹ The following is the text of the Anglo-Japanese treaty of Alliance of 1911:—

The Government of Great Britain and the Government of Japan, having in view the important changes which have taken place in the situation since the conclusion of the Anglo-Japanese agreement of the 12th August 1905, and believing that a revision of that Agreement responding to such changes would contribute to general stability and repose, have agreed upon the following stipulations to replace the Agreement above mentioned, such stipulations having the same object as the said Agreement, namely:—

(a) The consolidation and maintenance of the general peace in the regions of Eastern Asia and of India;

(b) The preservation of the common interests of all Powers in China by insuring the independence and integrity of the Chinese Empire and the principle of equal opportunities for the commerce and industry of all nations in China;

(c) The maintenance of the territorial rights of the High Contracting Parties in the regions of Eastern Asia and of India, and the defence of their special interests in the said regions:—

ARTICLE I.

It is agreed that whenever, in the opinion of either Great Britain or Japan, any of the rights and interests referred to in the preamble of this Agreement are in jeopardy, the two Governments will communicate with one another fully and frankly, and will consider in common the measures which should be taken to safeguard those menaced rights or interests.

ARTICLE II.

If by reason of unprovoked attack or aggressive action, wherever arising, on the part of any Power or Powers, either High Contracting Party should be involved in war in defence of its territorial rights or special interests mentioned in the preamble of this Agreement, the other High Contracting Party will at once come to the assistance of its ally, and will conduct the war in common, and make peace in mutual agreement with it.

ARTICLE III.

The High Contracting Parties agree that neither of them will, without consulting the other, enter into separate arrangements with another Power to the prejudice of

§ 570. Subjects of alliances are said to be full-Sovereign States only. But the fact cannot be denied that alliances have been concluded by States under suzerainty. Thus, the convention of April 16, 1877, between Roumania, which was then under Turkish suzerainty, and Russia, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance.¹ Thus, further, the former South African Republic, although, at any rate according to the views of the British Government, a half-Sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by treaty of March 17, 1897.²

Parties to Alliance.

A neutralised State can be the subject of an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

§ 571. As already mentioned, an alliance may be

Different kinds of Alliances.

the objects described in the preamble of this Agreement.

ARTICLE IV.

Should either High Contracting Party conclude a treaty of general arbitration with a third Power, it is agreed that nothing in this Agreement shall entail upon such Contracting Party an obligation to go to war with the Power with whom such treaty of arbitration is in force.

ARTICLE V.

The conditions under which armed assistance shall be afforded by either Power to the other in the circumstances mentioned in the present Agreement, and the means by which such assistance is to be made available, will be arranged by the Naval and Military authorities of the High Contracting Parties, who will from time to time consult one another fully and freely upon all questions of mutual interest.

ARTICLE VI.

The present Agreement shall come

into effect immediately after the date of its signature, and remain in force for ten years from that date.

In case neither of the High Contracting Parties should have notified twelve months before the expiration of the said ten years the intention of terminating it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. But if, when the date fixed for its expiration arrives, either ally is actually engaged in war, the alliance shall, *ipso facto*, continue until peace is concluded.

In faith whereof the undersigned, duly authorised by their respective Governments, have signed this Agreement, and have affixed thereto their Seals.

Done in duplicate at London, the 13th day of July 1911.

¹ See Martens, N.R.G. 2nd Ser. III. p. 182.

² See Martens, N.R.G. 2nd Ser. XXV. p. 327.

offensive or defensive, or both. All three kinds may be either general alliances, in which case the allies are united against any possible enemy whatever, ~~or~~ particular alliances against one or more individual enemies. Alliances, further, may be either permanent or temporary, and in the latter case they expire with the period of time for which they were concluded. As regards offensive alliances, it must be emphasised that they are valid only when their object is not immoral.¹

Condi-
tions of
Alliances.

§ 572. Alliances may contain all sorts of conditions. The most important are the conditions regarding the assistance to be rendered. It may be that assistance is to be rendered with the whole or a limited part of the military and naval forces of the allies, or with the whole or a limited part of their military or with the whole or a limited part of their naval forces only. Assistance may, further, be rendered in money only, so that one of the allies is fighting with his forces while the other supplies a certain sum of money for their maintenance. A treaty of alliance of such a kind must not be confounded with a simple treaty of subsidy. If two States enter into a convention that one of the parties shall furnish the other permanently in time of peace and war with a limited number of troops in return for a certain annual payment, such convention is not an alliance, but a treaty of subsidy only. But if two States enter into a convention that in case of war one of the parties shall furnish the other with a limited number of troops, be it in return for payment or not, such convention really constitutes an alliance. For every convention concluded for the purpose of lending succour in time of war implies an alliance. It is for this reason that the above-mentioned² treaty of 1877 between Russia and Roumania concerning the passage of Russian troops through Roumanian

¹ See above, § 505.

² See above, § 570.

territory in case of war against Turkey was really a treaty of alliance.

§ 573. *Casus fœderis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus in case of a defensive alliance the *casus fœderis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which shall be the *casus fœderis*, and then the latter is less exposed to controversy. But, on the other hand, there have been many alliances concluded without such specialisation, and, consequently, disputes have arisen later between the parties as to the *casus fœderis*.

*Casus
Fœderis.*

That the *casus fœderis* is not influenced by the fact that a State, subsequent to entering into an alliance, concludes a treaty of general arbitration with a third State, has been pointed out above, § 522.

III

TREATIES OF GUARANTEE AND OF PROTECTION

Vattel, II. §§ 235-239—Hall, § 113—Phillimore, II. §§ 56-63—Twiss, I. § 249—Halleck, I. p. 285—Taylor, §§ 350-353—Wheaton, § 278—Bluntschli, §§ 430-439—Heffter, § 97—Geffcken in Holtzendorff, III. pp. 85-112—Liszt, § 22—Ullmann, § 83—Fiore, Code, Nos. 787-791—Bonfils, Nos. 882-893—Despagnet, No. 461—Mérignhac, II. p. 681—Nys, III. pp. 36-41—Pradier-Fodéré, II. Nos. 969-1020—Rivier, II. pp. 97-105—Calvo, III. §§ 1584-1585—Martens, I. § 115—Neyron, "Essai historique et politique sur les garanties" (1779)—Milovanovitch, "Des traités de garantie en droit international" (1888)—Erich, "Ueber Allianzen und Allianzverhältnisse nach heutigem Völkerrecht" (1907)—Quabbe, "Die völkerrechtliche Garantie" (1911).

§ 574. Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party. Guarantee treaties may be mutual or unilateral. They may be concluded by two States only, or by a number

Concep-
tion and
Objects of
Guarantee
Treaties.

of States jointly, and in the latter case the single guarantors may give their guarantee severally or collectively or both. And the guarantee may be for a certain period of time only or permanent.

The possible objects of guarantee treaties are numerous.¹ It suffices to give the following chief examples: the performance of a particular act on the part of a certain State, as the discharge of a debt or the cession of a territory; certain rights of a State; the undisturbed possession of the whole or a particular part of the territory; a particular form of Constitution; a certain status, as permanent neutrality² or independence³ or integrity⁴; a particular dynastic succession; the fulfilment of a treaty concluded by a third State.

Effect of
Treaties of
Guaran-
tee.

§ 575. The effect of guarantee treaties is the creation of the duty of the guarantors to do what is in their power in order to secure the guaranteed objects. The compulsion to be applied by a guarantor for that purpose depends upon the circumstances; it may eventually be war. But the duty of the guarantor to render, even by compulsion, the promised assistance to the guaranteed depends upon many conditions and circumstances. Thus, first, the guaranteed must request the guarantor to render assistance. When, for instance, the possession of a certain part of its territory is guaranteed to a State which after its defeat in a war with a third

¹ The important part that treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, "England's Treaties of Guarantee," in *The Law Magazine and Review*, VI. (1881), pp. 215-238.

² See above, § 95.

³ Thus Great Britain, France, and Russia have guaranteed, by the Treaty with Denmark of July 13, 1863, the independence (but also the monarchy) of Greece (Martens, N.R.G. XVII. Part. II. p. 79). The United States of America has guaranteed the independence of

Cuba by the Treaty of Havana of May 22, 1903 (Martens, N.R.G. 2nd Ser. XXXII. p. 79), and of Panama by the Treaty of Washington of November 18, 1903 (Martens, N.R.G. 2nd Ser. XXXI. p. 599).

⁴ Thus the integrity of Norway is guaranteed by Great Britain, Germany, France, and Russia by the Treaty of Christiania of November 2, 1907; see Martens, N.R.G. 3rd Ser. II. p. 9. A condition of this integrity is that Norway does not cede any part of her territory to any foreign Power.

State agrees as a condition of peace to cede such piece of territory to the victor without having requested the intervention of the guarantor, the latter has neither a right nor a duty to interfere. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles or other factors that its interference would expose it to a serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed has not complied with previous advice given by the guarantor as to the line of its behaviour, it is not the guarantor's duty to render assistance afterwards.

It is impossible to state all the circumstances and conditions upon which the fulfilment of the duty of the guarantor depends, as every case must be judged upon its own merits. And it is certain that, more frequently than in other cases, changes in political constellations and the general developments of events may involve such vital change of circumstances as to justify¹ a State in refusing to interfere in spite of a treaty of guarantee. It is for this reason that treaties of guarantee to secure permanently a certain object to a State are naturally of a more or less precarious value to the latter. The practical value, therefore, of a guarantee treaty, whatever may be its formal character, would as a rule seem to extend to the early years only of its existence while the original conditions still obtain.

§ 576. In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration. On June 20, 1867, Lord Derby maintained² in the House of Lords concerning the collective guarantee

Effect of
Collective
Guaran-
tee.

¹ See above, § 539.

² Hansard, vol. 183, p. 150.

by the Powers of the neutralisation of Luxemburg that in case of a collective guarantee each guarantor had only the duty to act according to the treaty when all the other guarantors were ready to act likewise ; that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors. This opinion is certainly not correct,¹ and I do not know of any publicist who would or could approve of it. There ought to be no doubt that in a case of collective guarantee one of the guarantors alone cannot be considered bound to act according to the treaty of guarantee. For a collective guarantee can have the meaning only that the guarantors should act in a body. But if one of the guarantors themselves violates the object of his own guarantee, the body of the guarantors remains, and it is certainly their duty to act against such faithless co-guarantor. If, however, the majority,² and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority.

Different, however, is the case in which a number of Powers have *collectively and severally* guaranteed a certain object. Then, not only as a body but also individually, it is their duty to interfere in any case of violation of the object of guarantee.

Pseudo-
Guaran-
tees.

§ 576a. Different from real Guarantee Treaties are such treaties as declare the policy of the parties with regard to the maintenance of their territorial *status quo*. Whereas treaties guaranteeing the maintenance of the territorial *status quo* engage the guarantors to do what they can to maintain such *status quo*, treaties declaring the policy of the parties with regard to the maintenance

¹ See Hall, § 113; Bluntschli, § 440; and Quabbe, op. cit. pp. 149-159.

² See against this statement Quabbe, op. cit. p. 158.

of their territorial *status quo* do not contain any legal engagements, but simply state the firm resolution of the parties to uphold the *status quo*. In contradistinction to real guarantee treaties, such treaties declaring the policy of the parties may fitly be called Pseudo-Guarantee Treaties, and although their political value is very great, they have scarcely any legal importance. For the parties do not bind themselves to pursue a policy for maintaining the *status quo*, they only declare their firm resolution to that end. Further, the parties do not engage themselves to uphold the *status quo*, but only to communicate with one another, in case the *status quo* is threatened, with a view to agreeing upon such measures as they may consider advisable for the maintenance of the *status quo*. To this class of pseudo-guarantee treaties belong :—

(1) The Declarations¹ exchanged on May 16, 1907, between France and Spain on the one hand, and, on the other hand, between Great Britain and Spain, concerning the territorial *status quo* in the Mediterranean. Each party declares that its general policy with regard to the Mediterranean is directed to the maintenance of the territorial *status quo*, and that it is therefore resolved to preserve intact its rights over its insular and maritime possessions within the Mediterranean. Each party declares, further, that, should circumstances arise which would tend to alter the existing territorial *status quo*, it will communicate with the other party in order to afford it the opportunity to concert, if desired, by mutual agreement the course of action which the two parties shall adopt in common.

(2) The Declarations² concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on April 23, 1908, by Great Britain, Germany,

¹ See Martens, N.R.G. 2nd Ser. XXXV. p. 692, and 3rd Ser. I. p. 3.

² See Martens, N.R.G. 3rd Ser. I. pp. 17 and 18.

Denmark, France, Holland, and Sweden, and concerning the maintenance of the territorial *status quo* in the Baltic, signed at St. Petersburg, likewise on April 23, 1908, by Germany, Denmark, Russia, and Sweden. The parties declare their firm resolution to preserve intact the rights of all the parties over their continental and insular possessions within the region of the North Sea, and of the Baltic respectively. And the parties concerned further declare that, should the present territorial *status quo* be threatened by any events whatever, they will enter into communication with one another with a view to agreeing upon such measures as they may consider advisable in the interest of the maintenance of the *status quo*.

There is no doubt that the texts of the Declarations concerning the *status quo* in the North Sea and the Baltic stipulate a stricter engagement of the respective parties than the texts of the Declarations concerning the *status quo* in the Mediterranean, but neither¹ of them comprises a real legal guarantee.

Treaties
of Protec-
tion.

§ 577. Different from guarantee treaties are treaties of protection. Whereas the former constitute the guarantee of a certain object to the guaranteed, treaties of protection are treaties by which strong States simply engage to protect weaker States without any guarantee whatever. A treaty of protection must, however, not be confounded with a treaty of protectorate.²

¹ Whereas Quabbe (p. 97, note 1), correctly denies the character of a real guarantee to the Declarations concerning the Mediterranean, he

(p. 105) considers the Declarations concerning the North Sea and the Baltic real Guarantee Treaties.

² See above, § 92.

IV

COMMERCIAL TREATIES

Taylor, 354—Moore, V. §§ 765–769—Melle in Holtzendorff, III. pp. 143–256—Liszt, § 28—Ullmann, § 145—Bonfils, No. 918—Despagnet, No. 462—Pradier-Fodéré, IV. Nos. 2005–2033—Mérignhac, II. pp. 688–698—Rivier, I. pp. 370–374—Fiore, II. Nos. 1065–1077, and Code, Nos. 848–854—Martens, II. §§ 52–55—Steck, “Versuch über Handels- und Schiffsverkehrsverträge” (1782)—Schrout, “System der Handelsverträge und der Meistbegünstigung” (1884)—Veillevitch, “Les traités de commerce” (1892)—Nys, “Les origines du droit international” (1894), pp. 278–294—Herod, “Favoured Nation Treatment” (1901)—Calwer, “Die Meistbegünstigung in den Vereinigten Staaten von Nord-America” (1902)—Glier, “Die Meistbegünstigungs-Klausel” (1906)—Cavaretta, “La clausola della nazione più favorita” (1906)—Barclay, “Problems of International Law and Diplomacy” (1907), pp. 137–142—Hornbeck, “The Most-Favoured Nation Clause” (1910), and in A.J. III. (1909), pp. 394–422, 619–647, and 798–827—Lehr in R.I. XXV. (1893), pp. 313–316—Visser in R.I. 2nd Ser. IV. (1902), pp. 66–87, 159–177, and 270–280—Lehr in R.I. 2nd Ser. XII. (1910), pp. 657–668—Shepherd in *The Journal of the Society of Comparative Legislation*, New Series, III. (1901), pp. 231–237, and V. (1903), pp. 132–136—Oppenheim in *The Law Quarterly Review*, XXIV. (1908), pp. 328–334.

§ 578. Commercial treaties are treaties concerning the commerce and navigation of the contracting States and concerning the subjects of these States who are engaged in commerce and navigation. Incidentally, however, they also contain clauses concerning consuls and various other matters. They are concluded either for a limited or an unlimited number of years, and either for the whole territory of one or either party or only for a part of such territory—e.g., by Great Britain for the United Kingdom alone, or for Canada alone, and the like. All full-Sovereign States are competent to enter into commercial treaties, but it depends upon the special case whether half- and part-Sovereign States are likewise competent. Although competent to enter upon commercial treaties, a State may, by an international compact, be restricted in its freedom with regard to its commercial policy. Thus, according to articles 1 to 5 of the General Act of the Berlin Congo Conference

Com-
mercial
Treaties in
General.

of February 26, 1885, all the Powers which have possessions in the Congo district must grant complete freedom of commerce to all nations. Again, to give another example, France and Germany are by article 11 of the Peace of Frankfort of May 10, 1871, compelled to grant one another most-favoured-nation treatment in their commercial relations, in so far as favours which they grant to Great Britain, Belgium, Holland, Switzerland, Austria, and Russia are concerned.

The details of commercial treaties are for the most part purely technical and are, therefore, outside the scope of a general treatise on International Law. There are, however, two points of great importance which require discussion—namely, the meaning of coasting trade and of the most-favoured-nation clause.

Meaning
of Coast-
ing Trade
in Com-
mercial
Treaties.

§ 579. The meaning of the term coasting-trade¹ in commercial treaties must not be confounded with its meaning in International Law generally. The meaning of the term in International Law becomes apparent through its synonym *cabotage*—that is, navigation from cape to cape along the coast combined with trading between the ports of the coast concerned without going out into the Open Sea. Therefore, trade between Marseilles and Nice, between Calais and Havre, between London and Liverpool, and between Dublin and Belfast is coasting-trade, but trade between Marseilles and Havre, and between London and Dublin is not. It is a universally recognised rule² of International Law that every littoral State can exclude foreign merchantmen from the *cabotage* within its maritime belt. Cabotage is the contrast to the over-sea³ carrying trade, and has

¹ See Oppenheim in *The Law Quarterly Review*, XXIV. (1908), pp. 328–334.

² See above, § 187.

³ It must be emphasised that navigation and trade from abroad to several ports of the same coast

successively—for instance, from Dover to Calais and then to Havre—is not coasting-trade but over-sea trade, provided that all the passengers and cargo are shipped from abroad.

nothing to do with the question of free trade from or to a port on the coast to or from a port abroad. This question is one of commercial policy, and International Law does not prevent a State from restricting to vessels of its subjects the export from or the import to its ports, or from allowing such export or import under certain conditions only.

There is no doubt that originally the meaning of coasting-trade in commercial treaties was identical with its meaning in International Law generally, but there is likewise no doubt that the practice of the States gives now a much more extended meaning to the term coasting-trade as used in commercial treaties. Thus France distinguishes between cabotage *petit* and *grand*; whereas *petit* cabotage is coasting-trade between ports in the same sea, *grand* cabotage is coasting-trade between a French port situated in the Atlantic Ocean and a French port situated in the Mediterranean, and—according to a statute of September 21, 1793—both *grand* and *petit* cabotage are exclusively reserved for French vessels. Thus, further, the United States of America has always considered trade between one of her ports in the Atlantic Ocean and one in the Pacific to be coasting-trade, and has exclusively reserved it for vessels of her own subjects; she considers such trade coasting-trade even when the carriage takes place not exclusively by sea around Cape Horn, but partly by sea and partly by land through the Isthmus of Panama. Great Britain has taken up a similar attitude. Section 2 of the Navigation Act of 1849 (12 & 13 Vict. c. 29) enacted “that no goods or passengers shall be carried *coastwise* from one part of the United Kingdom to another, or from the Isle of Man to the United Kingdom, except in British ships,” and thereby declared trade between a port of England or Scotland to a port of Ireland or the Isle of Man to be coasting-trade exclusively |

reserved for British ships in spite of the fact that the Open Sea flows between these ports. And although the Navigation Act of 1849 is no longer in force, and this country now does admit foreign ships to its coasting-trade, it nevertheless still considers all trade between one port of the United Kingdom and another to be coasting-trade, as becomes apparent from Section 140 of the Customs Laws Consolidation Act of July 24, 1876 (39 & 40 Vict. c. 36). Again, Germany declared by a statute of May 22, 1881, coasting-trade to be trade between any two German ports, and reserved it for German vessels, although vessels of such States can be admitted as on their part admit German vessels to their own coasting-trade. Thus trade between Koenigsberg in the Baltic and Hamburg in the North Sea is coasting-trade.

These instances are sufficient to demonstrate that an extension of the original meaning of coasting-trade has really taken place and has found general recognition. A great many commercial treaties have been concluded between such countries as established that extension of meaning and others, and these commercial treaties no doubt make use of the term coasting-trade in this its extended meaning. It must, therefore, be maintained that the term coasting-trade or cabotage as used in commercial treaties has acquired the following meaning: *Sea-trade between any two ports of the same country whether on the same coast or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of Colonial dependencies of such country.*

In spite of this established extension of the term coasting-trade, it did not include colonial trade until nearly the end of the nineteenth century.¹ Indeed,

¹ See details in Oppenheim, loc. cit. pp. 331-332, but it is of value to draw attention here to a French statute of April 2, 1889. Whereas

a statute of April 9, 1866, had thrown open the trade between France and Algeria to vessels of all nations, article 1 of the statute of

when Russia, by *ukase* of 1897, enacted that trade between any of her ports should be considered coasting trade and be reserved for Russian vessels, this did not comprise a further extension of the conception of coasting-trade. The reason is that Russia, although her territory extends over different parts of the globe, is a political and geographical unit, and there is one stretch of territory only between St. Petersburg and Vladivostock. But when, in 1898 and 1899, the United States of America declared trade between any of her ports and those of Porto Rico, the Philippines, and the Hawaiian Islands to be coasting-trade, and consequently reserved it exclusively for American vessels, the distinction between coasting-trade and over-sea or colonial trade fell to the ground. It is submitted that this American extension of the conception of coasting-trade as used in her commercial treaties before 1898 is inadmissible¹ and contains a violation of the treaty rights of the other contracting parties. Should these parties consent to the American extension of the meaning of coasting-trade, and should other countries follow the American lead and apply the term coasting-trade indiscriminately to trade along their coasts *and* to their colonial trade, the meaning of the term would

April 2, 1889, enacts: *La navigation entre la France et l'Algérie ne pourra s'effectuer que sous pavillon français.* This French statute does not, as is frequently maintained, declare the trade between France and Algeria to be coasting-trade, but it nevertheless reserves such trade exclusively for French vessels. The French Government, in bringing the bill before the French Parliament, explained that the statute could not come into force before February 1, 1892, because art. 2 of the treaty with Belgium of May 14, 1882, and art. 21 of the treaty with Spain of February 6, 1882—both treaties to expire on February 1, 1892—stipulated the same treatment for Belgian and Spanish as for French vessels, *cabotage excepted*. It is quite apparent

that, if France had declared trade between French and Algerian ports to be coasting-trade in the meaning of her commercial treaties, the expiration of the treaties with Belgium and Spain need not have been awaited for putting the law of April 2, 1889, into force.

¹ In the case of *Huus v. New York and Porto Rico Steamship Co.* (1901), 182 United States 392, the Court was compelled to confirm the extension of the term coasting-trade to trade between any American port and Porto Rico, because this extension was recognised by section 9 of the Porto Rican Act, and because in case of a conflict between Municipal and International Law—see above, § 21—the Courts are bound to apply their Municipal Law.

then become *trade between any two ports which are under the sovereignty of the same State*. The distinction between coasting-trade and colonial trade would then become void, and the last trace of the synonymity between coasting-trade and cabotage would have disappeared.

Meaning
of most-
favoured-
nation
Clause.

§ 580. Most of the commercial treaties of the nineteenth century contain a stipulation which is characterised as the most-favoured-nation clause. The wording of this clause is by no means the same in all treaties, and its general form has therefore to be distinguished from several others which are more specialised in their wording. According to the most-favoured-nation clause in its general form, all favours which either contracting party has granted in the past or will grant in the future to any third State must be granted to the other party. But the real meaning of this clause in its general form has ever been controverted since the United States of America entered into the Family of Nations and began to conclude commercial treaties embodying the clause. Whereas in former times the clause was considered obviously to have the effect of causing all favours granted to any one State *at once and unconditionally* to accrue to all other States having most-favoured-nation treaties with the grantor, the United States contended that these favours could accrue to such of the other States only as *fulfilled the same conditions under which these favours had been allowed to the grantee*. The majority of the commercial treaties of the United States, therefore, do not contain the most-favoured-nation clause in its general form, but in what is called its conditional, qualified, or reciprocal, form. In this form it stipulates that all favours granted to third States shall accrue to the other party unconditionally, in case the favours have been allowed unconditionally to the grantee, but only under the same compensation, in case

they have been granted conditionally. The United States, however, has always upheld the opinion, and the supreme Court of the United States has confirmed ¹ this interpretation, that, even if a commercial treaty contains the clause in its general, and not in its qualified, form, it must always be interpreted as though it were worded in its qualified form.

Now nobody doubts that according to the qualified form of the clause a favour granted to any State can only accrue to other States having most-favoured-nation treaties with the grantor, provided they fulfil the same conditions and offer the same compensations as the grantee. Again, nobody doubts that, if the clause is worded in its so-called unconditional form stipulating the accrument of a favour to other States whether it was allowed to the grantee gratuitously or conditionally against compensation, all favours granted to any State accrue immediately and without condition to all the other States. However, as regards the clause in its general form, what might, broadly speaking, be called the European is confronted by the American interpretation. This American interpretation is, I believe, unjustifiable, although it is of importance to mention that two European writers of such authority as Martens (II. p. 225) and Westlake (I. p. 283) approve of it.

It has been suggested ² that the controversy should be brought before the Hague Court of Arbitration, yet the United States will never consent to this. Those States which complain of the American interpretation had therefore better notify their commercial treaties with the United States and insert in new treaties the most-favoured-nation clause in such a form as puts matters beyond all doubt. So much is certain, a State

¹ See *Bartram v. Robertson*, 122 United States 116, and *Whitney v. Robertson*, 124 United States 190.

² See *Barclay*, op. cit. pp. 142 and 159.

that at present enters upon a commercial treaty with the United States comprising the clause in its general form cannot complain¹ of the American interpretation, which, whatever may be its merits, is now a matter of common knowledge.²

V

UNIONS CONCERNING COMMON NON-POLITICAL INTERESTS

Nys, II. pp. 264-270—Mérignhac, II. pp. 694-731—Descamps, "Les offices internationaux et leur avenir" (1894)—Moynier, "Les Bureaux internationaux des unions universelles" (1892)—Poincard, "Les Unions et ententes internationales" (2nd ed. 1901)—Renault in R.G. III. (1896), pp. 14-26—Reinsch, "Public International Unions" (1911), and in A.J. I. pp. 579-623, and III. pp. 1-45.

Object of
the
Unions.

§ 581. The development of international intercourse has called into existence innumerable treaties for the purpose of satisfying economic and other non-political interests of the several States. Each nation concludes treaties of commerce, of navigation, of extradition, and of many other kinds with most of the other nations, and tries in this way, more or less successfully, to foster its own interests. Many of these interests are of such a particular character and depend upon such individual circumstances and conditions that they can only be satisfied and fostered by special treaties from time to time concluded by each State with other States. Yet experience has shown that the several States have also many non-political interests in common which can better be satisfied and fostered by a general treaty between a great number of States than by special

¹ See above, § 554, No. 9.

² It is not possible in a general treatise on International Law to enter into the details of the history, the different forms, the application, and the interpretation of the most-favoured-nation clause. Readers

must be referred for further information to the works and articles of Calwer, Herod, Glier, Cavaretta, Visser, Melle, and others quoted above before § 578. See also Moore, V. §§ 765-769.

treaties singly concluded between the several parties. Therefore, since the second half of the nineteenth century, such general treaties have more and more come into being, and it is certain that their number will in time increase. Each of these treaties creates what is called a Union among the contracting parties, since these parties have united for the purpose of settling certain subjects in common. The number of States which are members of these Unions varies, of course, and whereas some of them will certainly become in time universal in the same way as the Universal Postal Union, others will never reach that stage. But all the treaties which have created these Unions are general treaties because a lesser or greater number of States are parties, and these treaties have created so-called Unions, although the term "Union" is not always made use of.¹

§ 582. Whereas previously the States severally concluded treaties concerning postal and telegraphic arrangements, they entered into Unions for this purpose during the second part of the nineteenth century :—

Post and
Tele-
graphs.

(1) Twenty-one States entered on October 9, 1874, at Berne, into a general postal convention² for the purpose of creating a General Postal Union. This General turned into the Universal Postal Union through the Convention of Paris³ of June 1, 1878, to which thirty States were parties. This convention has several times been revised by the congresses of the Union, which have to meet every five years. The last revision took place at the Congress of Rome, 1906, where, on

¹ A general treatise on Public International Law cannot attempt to go into the details of these Unions; it is really a matter for monographs or for a treatise on International Administrative Law, such as Neumayer's "Internationales Verwaltungsrecht," which is to comprise

three volumes, and of which the first volume appeared in 1910. See also Reinsch, "Public International Unions" (1911).

² See Martens, N.R.G. 2nd Ser. I. p. 651.

³ See Martens, N.R.G. 2nd Ser. III. p. 699.

May 26, a new Universal Postal Convention¹ was signed by all the members of the Family of Nations for themselves and their colonies and dependencies. This Union possesses an International Office seated at Berne.²

(2) A general telegraphic convention was concluded at Paris already on May 17, 1865, and in 1868 an International Telegraph Office³ was instituted at Berne. In time more and more States joined, and the basis of the Union is now the Convention of St. Petersburg⁴ of July 22, 1875, which has been amended several times, the last time at Lisbon on June 11, 1908. That the Union will one day become universal there is no doubt, but as yet, although called "Universal" Telegraphic Union, only about thirty States are members.

(3) Concerning the general treaty of March 14, 1884, for the protection of submarine telegraph cables,⁵ see above, § 287.

(4) A general radio-telegraphic convention⁶ was signed by twenty-seven States on November 3, 1906, at Berlin. This Union has an International Office at Berne which is combined with that of the Universal Telegraph Union.

Transport
and Com-
munica-
tion.

§ 583. Two general conventions are in existence in the interest of transport and communication:—

(1) A general convention⁷ was concluded on October 14, 1890, at Berne concerning railway transports and freights. The parties—namely, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, and Switzerland—form a Union for this purpose, although the term "Union" is not made use of.

¹ See Martens, N.R.G. 3rd Ser. I. p. 355.

² See Fischer, "Post und Telegraphie im Weltverkehr" (1879); Schröter, "Der Weltpostverein" (1900); Rolland, "De la correspondance postale et télégraphique dans les relations internationales" (1901).

³ See above, § 464, and Fischer "Die Telegraphie und das Völkerrecht" (1876).

⁴ See Martens, N.R.G. 2nd Ser. III. p. 614.

⁵ See Martens, N.R.G. 2nd Ser. XI. p. 281.

⁶ See Martens, N.R.G. 3rd Ser. III. p. 147, and above, § 174, No. 2, and §§ 287a and 287b, where the literature concerned is also to be found.

⁷ See Martens, N.R.G. 2nd Ser. XIX. p. 289.

The Union possesses an International Office¹ at Berne, which issues the *Zeitschrift für den internationalen Eisenbahn transport* and the *Bulletin des transports internationaux par chemins de fer*. Denmark, Roumania, and Sweden acceded to this Union some time after its conclusion.

(2) A general convention concerning the International Circulation of Motor Vehicles² was concluded on October 11, 1909, at Paris. The original signatory Powers were:—Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Spain, France, Greece, Italy, Monaco, Montenegro, Holland, Portugal, Roumania, Russia, Servia; but Greece, Montenegro, Portugal, and Servia have not yet ratified. Luxemburg, Sweden, and Switzerland acceded later on. To give effect to this convention in Great Britain, Parliament passed in 1909 the Motor Car (International Circulation) Act,³ 9 Edw. VII. c. 37.

§ 584. On September 9, 1886, the Convention of Berne was signed for the purpose of creating an international Union for the Protection of Works of Art and Literature. The Union has an International Office⁴ at Berne. An additional Act to the convention was signed at Paris on May 4, 1906. Since, however, the stipulations of these conventions did not prove quite adequate, the "Revised⁵ Berne Convention" was signed at Berlin on November 13, 1908. The parties

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¹ See above, § 470, and Kaufmann, "Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht" (1893); Rosenthal, "Internationales Eisenbahnfrachtrecht" (1894); Magne, "Des raccordements internationaux de chemins de fer, &c." (1901); Eger, "Das internationale Uebereinkommen über den Eisenbahnfrachtverkehr" (2nd ed. 1903).

² See Martens, N.R.G. 3rd Ser. III. p. 834, and Treaty Series, 1910, No. 19.

³ See also the Motor Car (International Circulation) Order in Council, 1910.

⁴ See above, § 467, and Orelli, "Der internationale Schutz des Urheberrechts" (1887); Thomas, "La convention littéraire et artistique internationale, &c." (1894); Briggs, "The Law of International Copyright" (1906); Röthlisberger, "Die Berner Uebereinkunft zum Schutze von Werken der Literatur und Kunst" (1906).

⁵ See Martens, N.R.G. 3rd Ser. IV. p. 590; Wauwermans, "La convention de Berne (révisée à Berlin) pour la protection des œuvres littéraires et artistiques" (1910).

are Great Britain, Germany, Belgium, Denmark, Spain, France, Haiti, Italy, Japan, Liberia, Luxemburg, Monaco, Norway, Sweden, Switzerland, Tunis; but Denmark, France, Italy, Sweden, and Tunis have not yet ratified. Portugal acceded later. To give effect to the Convention of Berne of 1886, Parliament passed in 1886 the "Act to amend the Law respecting International and Colonial Copyright" (49 & 50 Vict. c. 33). This Act, however, was, in consequence of the "Revised Berne Convention" of Berlin of 1908, repealed by section 37 of the Copyright Act, 1911 (1 Geo. V. c. 00), and sections 30 and 31 of the latter Act now deal with International Copyright.

Commerce
and
Industry.

§ 585. In the interests of commerce and industry three Unions are in existence :—

(1) On July 5, 1890, the Convention of Brussels was signed for the purpose of creating an international Union for the Publication of Customs Tariffs.¹ The Union has an International Office² at Brussels, which publishes the customs tariffs of the various States of the globe. The members of the Union are at present the following States :—Great Britain, Germany, Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chili, China, Colombia, Costa Rica, Cuba, Denmark, San Domingo, Ecuador, Egypt, France, Greece, Guatemala, Haiti, Holland, Honduras, Italy, Japan, Mexico, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Russia, Salvador, Servia, Siam, Spain, Sweden, Switzerland, Turkey, the United States of America, Uruguay, and Venezuela.

(2) On March 20, 1883, the Convention of Paris³ was signed for the purpose of creating an international Union for the Protection of Industrial Property. The original members were :—Belgium, Brazil, San Do-

¹ See Martens, N.R.G. 2nd Ser. XVIII. p. 558.

² See Martens, N.R.G. 2nd Ser. X. p. 133.

³ See above, § 469.

mingo, France, Holland, Guatemala, Italy, Portugal, Salvador, Servia, Spain, and Switzerland. Great Britain, Japan, Denmark, Mexico, the United States of America, Sweden-Norway, Germany, Cuba, and Austria-Hungary acceded later. This Union has an International Office¹ at Berne. The object of the Union is the protection of patents, trade-marks, and the like. On April 14, 1891, at Madrid, this Union agreed to arrangements concerning false indications of origin and the registration of trade-marks²; and an additional Act³ was signed at Brussels on December 14, 1900. These later arrangements, however, are accepted only by certain States of the Union; Great Britain, for instance, is a party to the former but not to the latter.

(3) On March 5, 1902, the Convention of Brussels⁴ was signed concerning the abolition of bounties on the production and exportation of sugar. The original parties were:—Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Spain, and Sweden; but Spain has never ratified. Luxemburg, Peru, and Russia acceded later. A Permanent Commission⁵ was established at Brussels for the purpose of supervising the execution of the convention. An additional Act⁶ was signed at Brussels on August 28, 1907.

§ 586. Three general conventions are in existence in the interest of Agriculture:—

(1) On June 7, 1905, the Convention for the Creation of an International Agricultural Institute⁷ was signed at Rome by forty States. The Institute has its seat at Rome.

¹ See above, § 467.

² See Martens, N.R.G. 2nd Ser. XXII. p. 208, and Pelletier et Vidal-Noguet, "La convention d'union pour la protection de la propriété industrielle du 20 mars 1883 et les conférences de révision postérieures" (1902).

³ See Martens, N.R.G. 2nd Ser. XXX. p. 475.

⁴ See Martens, N.R.G. 2nd Ser. XXXI. p. 272, and Kaufmann, "Welt-Zucker Industrie und internationale und coloniales Recht" (1904).

⁵ See above, §§ 462 and 471.

⁶ See Martens, N.R.G. 3rd Ser. I. p. 874.

⁷ See above, § 471a, and Martens, N.R.G. 3rd Ser. II. p. 238, and Treaty Series, 1910, No. 17.

(2) Owing to the great damage done to grapes through phylloxera epidemics a general convention¹ for the prevention of the extension of such epidemics was concluded on September 17, 1878, at Berne. Its place was afterwards taken by the convention² signed at Berne on November 3, 1881. The original members were :—Austria-Hungary, France, Germany, Portugal, and Switzerland. Belgium, Italy, Spain, Holland, Luxemburg, Roumania, and Servia acceded later.

(3) On March 19, 1902, a general convention³ was signed at Paris concerning the preservation of birds useful to agriculture. The parties are :—Germany, Austria-Hungary, Belgium, Spain, France, Greece, Luxemburg, Monaco, Norway, Portugal, Sweden, Switzerland.

Welfare
of Work-
ing
Classes.

§ 587. Two general treaties are in existence with regard to the welfare of the working classes :—

(1) On September 26, 1906, was signed at Berne a convention⁴ concerning the prohibition of the use of white phosphorus in the manufacture of matches. The original parties were :—Germany, Denmark, France, Holland, Luxemburg, Switzerland. Great Britain, Italy, Spain, and Tunis acceded later. To give effect to this convention in Great Britain, Parliament passed in 1908 the White Phosphorus Matches Prohibition Act (8 Edw. VII. c. 42).

(2) Likewise at Berne on September 26, 1906, was signed the convention⁵ for the prohibition of night-work for women in industrial employment. The original parties are :—Great Britain, Germany, Austria-Hungary, Belgium, Spain, France, Luxemburg, Holland, Portugal, and Switzerland. Italy and Sweden, which had signed

¹ See Martens, N.R.G. 2nd Ser. VI. p. 261.

² See Martens, N.R.G. 2nd Ser. VIII. p. 435.

³ See Martens, N.R.G. 2nd Ser. XXX. p. 686.

⁴ See Martens, N.R.G. 3rd Ser. II. p. 872, and Treaty Series, 1909, No. 4.

⁵ See Martens, N.R.G. 3rd Ser. II. p. 861, and Treaty Series, 1910, No. 21.

the convention, but had not ratified in time, acceded in 1910.

§ 588. One Union concerning weights and measures and two monetary Unions are in existence.

Weights,
Measures,
Coinage.

(1) In the interest of the unification and improvement of the metric system a general convention¹ was signed at Paris on May 20, 1875, for the purpose of instituting at Paris an International Office² of Weights and Measures. The original parties were:—Argentina, Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Italy, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, Turkey, the United States of America, and Venezuela; but Brazil has never ratified. Great Britain, Japan, Mexico, Roumania, and Servia acceded later.

(2) On December 23, 1865, Belgium, France, Italy, and Switzerland signed the Convention of Paris which created the so-called “Latin Monetary Union” between the parties; Greece acceded in 1868.³ This convention was three times renewed and amended—namely, in 1878, 1885, and 1893.⁴

Another Monetary Union is that entered into by Denmark, Sweden, and Norway by the Convention of Copenhagen⁵ of May 27, 1873.

On November 22, 1892, the International Monetary Conference⁶ met at Brussels, where the following States were represented:—Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Mexico, Portugal, Roumania, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. The deliberations of this conference, however, had no practical result.

¹ See Martens, N.R.G. 2nd Ser. I. p. 663.

² See above, § 466.

³ See Martens, N.R.G. XX. pp. 688 and 694.

⁴ See Martens, N.R.G. 2nd Ser. IV. p. 725, XI. p. 65, XXI. p. 285.

⁵ See Martens, N.R.G. 2nd Ser. I. p. 290.

⁶ See Martens, N.R.G. 2nd Ser. XXIV. pp. 167–478.

Official
Publica-
tions.

§ 589. On March 15, 1886, Belgium, Brazil, Italy, Portugal, Servia, Spain, Switzerland, and the United States of America signed at Brussels a convention¹ concerning the exchange of their official documents and of their scientific and literary publications in so far as they are edited by the Governments. The same States, except Switzerland, signed under the same date at Brussels a convention² for the exchange of their *Journaux officiels ainsi que des annales et des documents parlementaires*.

Sanita-
tion.

§ 590. In the interest of public health as endangered by cholera and plague a number of so-called sanitary conventions have been concluded :—

(1) On January 30, 1892, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Greece, Italy, Holland, Portugal, Russia, Sweden-Norway, and Turkey signed the International Sanitary Convention of Venice.³

(2) On April 15, 1893, Germany, Austria-Hungary, Belgium, France, Italy, Luxemburg, Montenegro, Holland, Russia, Switzerland signed the Cholera Convention of Dresden; ⁴ but Montenegro has not ratified. Great Britain, Servia, Lichtenstein, and Roumania acceded later.

(3) On April 3, 1894, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Greece, Italy, Holland, Persia, Portugal, and Russia signed the Cholera Convention of Paris; an additional declaration was signed at Paris on October 30, 1897.⁵ Sweden-Norway acceded later.

(4) On March 19, 1897, Great Britain, Germany,

¹ See Martens, N.R.G. 2nd Ser. XIV. p. 287.

² See Martens, N.R.G. 2nd Ser. XIV. p. 285.

³ See Martens, N.R.G. 2nd Ser. XIX. p. 261, and Treaty Series, 1893, No. 8.

⁴ See Martens, N.R.G. 2nd Ser. XIX. p. 39, and Treaty Series, 1894, No. 4.

⁵ See Martens, N.R.G. 2nd Ser. XXIV. pp. 516 and 552, and Treaty Series, 1899, No. 8.

Austria-Hungary, Belgium, Spain, France, Greece, Italy, Luxemburg, Montenegro, Turkey, Holland, Persia, Portugal, Roumania, Russia, Servia, and Switzerland signed the Plague Convention of Venice; an additional declaration was signed at Rome on January 24, 1900; ¹ but Greece, Turkey, Portugal, and Servia do not seem to have ratified. Sweden acceded later.

(5) For the purpose of revising the previous cholera and plague conventions and amalgamating them into one document, Great Britain, Germany, Austria-Hungary, Belgium, Brazil, Spain, the United States of America, France, Italy, Luxemburg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Switzerland, and Egypt signed on December 3, 1903, the International Sanitary Convention of Paris.² Denmark, Mexico, Norway, Sweden, and Zanzibar acceded later. It is, however, of importance to mention that the previous sanitary conventions remain in force for those signatory Powers who do not become parties to this convention.

(6) For the purpose of organising the International Office of Public Health contemplated by the Sanitary Convention of Paris of December 3, 1903, Great Britain, Belgium, Brazil, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Switzerland, and Egypt signed at Rome on December 9, 1907, an agreement³ concerning the establishment of such an office at Paris; ⁴ but it would seem that Holland and

¹ See Martens, N.R.G. 2nd Ser. XXVIII. p. 339, XXIX. p. 495, and Treaty Series, 1900. No. 6—See also Loutti, "La politique sanitaire internationale" (1906). Attention should be drawn to a very valuable suggestion made by Ullmann in R.I. XI. (1879), p. 527, and in R.G. IV. (1897), p. 437. Bearing in mind the fact that frequently in time of war epidemics break out in consequence of insufficient disinfection

of the battlefields, Ullmann suggests a general convention instituting neutral sanitary commissions whose duty would be to take all necessary sanitary measures after a battle.

² See Martens, N.R.G. 3rd Ser. I. p. 78, and Treaty Series, 1907, No. 27.

³ See Martens, N.R.G. 3rd Ser. II. p. 913, and Treaty Series, 1909, No. 6.

⁴ See above, § 471b.

Portugal have not yet ratified. Argentina, Bulgaria, Mexico, Persia, Peru, Servia, Sweden, and Tunis acceded later.

Pharmaco-
pœia.

§ 591. On November 29, 1906, Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Denmark, Spain, the United States of America, France, Greece, Italy, Luxemburg, Norway, Holland, Russia, Servia, Sweden, and Switzerland signed at Brussels an agreement concerning the Unification of the Pharmacopœial Formulas for Potent Drugs.¹

Human-
ity.

§ 592. In the interest of humanity two Unions—although the term “Union” is not made use of in the treaties—are in existence, namely, that concerning Slave Trade and that concerning the so-called White Slave Traffic.

(1) A treaty concerning slave trade² was already in 1841 concluded between Great Britain, Austria, France, Prussia, and Russia. And article 9 of the General Act of the Berlin Congo Conference of 1885 likewise dealt with the matter. But it was not until 1890 that a Union for the suppression of the slave trade came into existence. This Union was established by the General Act³ of the Brussels Conference, signed on July 2, 1890, and possesses two International Offices,⁴ namely, the International Maritime Office at Zanzibar and the Bureau Spécial attached to the Foreign Office at Brussels. The signatory Powers are :—Great Britain, Austria-Hungary, Belgium, Congo Free State, Denmark, France, Germany, Holland, Italy, Persia, Portugal, Russia, Spain, Sweden-Norway, the United States of America, Turkey, and Zanzibar. Liberia acceded later.

(2) On May 18, 1904, an Agreement for the Suppres-

¹ See Martens, N.R.G. 3rd Ser. I. p. 592, and Treaty Series, 1907, No. 1.

² See above, § 292, p. 368, note 2.

³ See Martens, N.R.G. 2nd Ser. XVI. p. 3.

⁴ See above, § 468.

sion of the White Slave Traffic¹ was signed at Paris by Great Britain, Germany, Belgium, Denmark, Spain, France, Italy, Holland, Portugal, Russia, Sweden-Norway, and Switzerland. Brazil and Luxemburg acceded later. A further Agreement concerning the subject was signed at Paris on May 4, 1910, by thirteen States, but has not yet been ratified.

§ 593. Two general treaties are in existence for the purpose of preserving certain animals in certain parts of the world :—

Preservation of Animal World.

(1) In behalf of the preservation of wild animals, birds, and fish in Africa, the Convention of London² was signed on May 19, 1900, by Great Britain, the Congo Free State, France, Germany, Italy, Portugal, and Spain; Liberia acceded later. However, this convention has not yet been ratified.

(2) In behalf of the prevention of the extinction of the seals in the Behring Sea, the Pelagic Sealing Convention³ of Washington was signed on July 7, 1911, by Great Britain, the United States of America, Japan, and Russia, but has not yet been ratified.

§ 594. Various general treaties have been concluded for the purpose of establishing uniform rules concerning subjects of the so-called Private International Law :—

Private International Law.

(1) Already on November 14, 1896, a general treaty concerning the conflict of laws relative to procedure in civil cases was concluded at the Hague. But this treaty was replaced by the Convention⁴ of the Hague of July 17, 1905, which is signed by Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Italy, Luxemburg, Norway, Holland, Portugal, Roumania, Russia, Sweden, and Switzerland.

¹ See Martens, N.R.G. 2nd Ser. XXXII. p. 160, and Treaty Series, 1905, No. 24—See also Butz, "Die Bekämpfung des Mädchenhandels im internationalen Recht" (1908); Rehm in Z. V. I. (1907), pp. 446-453.

² See Martens, N.R.G. 2nd Ser. XXX. p. 430.

³ See above, § 284.

⁴ See Martens, N.R.G. 3rd Ser. II. p. 243.

(2) On June 12, 1902, likewise at the Hague, were signed three conventions¹ for the purpose of regulating the conflict of laws concerning marriage, divorce, and guardianship. The signatory Powers are Germany, Austria-Hungary, Belgium, Spain, France, Italy, Luxemburg, Holland, Portugal, Roumania, Sweden, and Switzerland.

(3) Again at the Hague, on July 17, 1905, were signed two conventions for the purpose of regulating the conflict of laws concerning the effect of marriage upon the personal relations and the property of husband and wife, and concerning the placing of adults under guardians or curators. The signatory Powers are Germany, France, Italy, Holland, Portugal, Roumania, and Sweden.²

American
Republics.

§ 595. The first Pan-American Conference held at Washington in 1889 created the International Union of the American Republics for prompt collection and distribution of commercial information.³ This Union of the twenty-one independent States of America established an International Office at Washington, called at first "The American International Bureau," but the fourth Pan-American Conference, held at Buenos Ayres in 1910, changed the name of the Office⁴ to "The Pan-American Union." At the same time this conference considerably extended⁵ the scope of the task of this Bureau to include, besides other objects, the function of a permanent commission of the Pan-American Conferences which has to keep the archives, to assist in obtaining the ratification of the resolutions and conventions adopted, to study or initiate projects to be included in the programme of the conferences, to communicate them to the several Governments, and to

¹ See Martens, N.R.G. 2nd Ser. XXXI. pp. 706, 715, 724.

² Meili and Mamelok, "Das internationale Privat-und Zivilprozessrecht auf Grund der Haager Konventionen" (1911), offers a digest of all the Hague Conventions concerned.

³ See Barrett, "The Pan-American Union" (1911).

⁴ See above, § 467a.

⁵ See Reinsch, "Public International Unions" (1911), p. 117.

formulate the programme and regulations of each successive conference.

§ 596. In the interest of scientific research the following Unions¹ have been established :— Science.

(1) On October 30, 1886, Great Britain, Germany, Argentina, Austria-Hungary, Belgium, Denmark, Spain, the United States of America, France, Greece, Italy, Japan, Mexico, Norway, Holland, Portugal, Roumania, Russia, Sweden, and Switzerland signed a convention at Berlin for the purpose of creating an International Geodetic Association. Already in 1864 a number of States had entered at Berlin into an Association concerning geodetic work in Central Europe, and in 1867 the scope of the association was expanded to the whole of Europe, but it was not until 1886 that the geodetic work of the whole world was made the object of the Geodetic Association. The convention of 1886, however, was revised and a new convention was signed at Berlin on October 11, 1895.² The Association, which arranges an international conference every three years, possesses a Central Office at Berlin.

(2) On July 28, 1903, was signed at Strasburg a convention for the purpose of creating an International Seismologic Association. This convention was revised on August 15, 1905, at Berlin.³ The following States are parties :—Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Canada, Chili, Spain, the United States of America, France, Greece, Italy, Japan, Mexico, Norway, Holland, Portugal, Roumania, Russia, Servia, and Switzerland. The Association, which arranges an

¹ The conventions which have created these Unions would seem to be nowhere officially published and are, therefore, not to be found in the Treaty Series or in Martens. The dates and facts mentioned in the text are based on private and such information as can be gathered from the *Annuaire de la Vie Internationale*, 1908–1909, pp. 389–401.

² For the text of this Convention, see *Annuaire de la Vie Internationale*, 1908–1909, p. 390.

³ The text of this Convention is not published in the *Annuaire de la Vie Internationale*, 1908–1909, but its predecessor of 1903 is published there on p. 393.

international conference at least once in every four years, has a Central Office at Strasburg.

(3) On May 11, 1901, a convention was signed at Christiania for the International Hydrographic and Biologic Investigation of the North Sea.¹ The parties are Great Britain, Germany, Belgium, Denmark, Holland, Norway, Russia, and Sweden. The Association possesses a Central Office.

¹ For the text of this Convention, see *Annuaire de la Vie Internationale*, 1908-1909, p. 397.

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